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91-73

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KENNETH W. DAVIS, JR., ET AL

Petitioners,
(Plaintiffs-Appellants)

VERSUS

MORGAN GUARANTY TRUST CO., ET AL

Respondents.
(Defendants-Appellees)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

EUGENE B. WILSHIRE, JR.
Counsel of Record

WILSHIRE SCOTT & DYER
4450 First City Tower
Houston, Texas 77002
(713) 651-1221

PHIL BURLESON, SR.

BURLESON, PATE & GIBSON
3315 Daniels
Dallas, Texas 75205
(713) 692-2577

INDEX

	Page
Opinion and Judgment of the Court of Appeals for the Fifth Circuit - - - - - - - - - - (April 8, 1991)	1a
Opinion and Judgment of the United States District Court for the Northern District of Texas, Fort Worth Division - - - - - - - - - (June 20, 1990)	3a
Plaintiffs' Amended Complaint - - - (July 1988)	67a

IN THE UNITED STATES DISTRICT COURT

FOR THE FIFTH CIRCUIT

No. 90-1582

KENNETH W. DAVIS, JR.,
ALANA DAVIS MARSH,
Individually and as Next Friend and
CUSTODIAN FOR TRICIA KAY LAWLER,
A Minor, et al., etc.,

Plaintiffs-Appellants,

VERSUS

MORGAN GUARANTY TRUST CO.
OF NEW YORK, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas
(CA 4 88 118 E)

(April 8, 1991)

Before THORNBERRY, JOLLY, and SMITH, Circuit Judges:

PER CURIAM:[1]

The district court dismissed this action for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The court explained its reasons in a lengthy, thorough, persuasive opinion. The court concludes, in that opinion, that the plaintiffs lack standing.

We agree with that conclusion. Accordingly, we affirm on the basis of the district court's able opinion, and we have no need to consider whether the judgment could be affirmed on other grounds, as well.

AFFIRMED.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH W. DAVIS, JR., ET AL.	§	
	§	
V.	§	CIVIL ACTION NO. 4-88-118-E
	§	
MORGAN GUARANTY TRUST COMPANY OF NEW YORK, ET AL.	§	

O R D E R

The Court now considers the defendants' motions to dismiss or in the alternative motions for summary judgment. After thorough consideration of the pleadings, record, and applicable law, and after presentation of oral arguments, the Court makes the following determination.

This case involves multiple plaintiffs and defendants. It also involves a prior proceeding in the Bankruptcy Court in the Northern District of Texas. A background of the proceedings as well as a description of the parties is essential.

The plaintiffs can be categorized

into two groups--the "Davis Family" plaintiffs[1] and the "Corporate" plaintiffs.[2] The defendants can also be categorized into two groups--the "Banks"[3]

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[1]The Davis Family plaintiffs consist of Kenneth W. Davis, Jr., Alana Davis Marsh, individually and as next friend and custodian for Tricia Kay Lawler, a minor, Alan Tucker Davis individually and as next friend and custodian for Alan Kenneth Davis and Jeneice Breanne Davis, minors, Kay Davis, individually and as trustee for her unborn children, T.C. Davis, II, Brian Keith Davis, Trey Davis, and Karen Davis as next friend and custodian for Chelsey Davis.

[2]The Corporate plaintiffs are Great Western Marketing Co., Great Western Drilling Co. and Kendavis Finance Co., a division of Great Western Drilling Co.

[3]The defendant Banks are Morgan Guaranty Trust Company of New York, Bank of Nova Scotia, Bank of New York, Security Pacific National Bank, Irving Trust Company, Credit Commercial De France, Marine Midland Bank, American Bank & Trust Company of New Orleans, First City National Bank-Houston, MBank-Dallas, MBank-Fort Worth, Bank of Oklahoma-Tulsa, First Interstate Bank of California, FirstRepublic Bank Dallas, FirstRepublic Bank Fort Worth, Texas American Bank-Fort Worth, Lloyds Bank of California, First City National Bank Fort Worth, Seattle

and the "Individual defendants."[4]

The suit also involves certain corporations which were owned and operated by the Davis Family. The Davis Family owned all of the stock in Kendavis Holding Company ("KHC") prior to the company's bankruptcy. Kendavis Holding company ("KHC") in turn owned 100% of the stock of Kendavis Industries International, Inc. ("KIII").[5] KHC also owned various companies known collectively as Kendavis Investment Companies ("KICs").

First National Bank, Den Norske Credit Bank-Norway, Chase Manhattan Bank and MBank-Houston.

[4]The Individual defendants are John Payne and Donald J. Robinson.

[5]The purpose of KIII was to function as a management consultant company providing specialized services to each KIC. Through the KIII finance department, KIII borrowed money and arranged financing on behalf of all of the KICs and effectively functioned as a corporate banker.

THE BANKRUPTCY PROCEEDING

This case dates back to the involuntary Chapter 11 bankruptcy proceedings of KHC and KIII originated on February 20, 1985. Eight of the defendant Banks filed involuntary petitions against Kendavis Holding Co. ("KHC"), and Kendavis Industries International, Inc. ("KIII"). In March of 1985, KHC and KIII consented to an order granting relief under Chapter 11 of the Bankruptcy Code. An Order for Relief was entered on March 19, 1985. Soon thereafter, the Banks filed involuntary petitions against several other Kendavis Industries Companies ("KICs").

On November 24, 1986, the Bankruptcy Court confirmed the creditors' plan of reorganization. The plan had the following effect: (1) it canceled all of the KHC capital stock and KIII common

stock; (2) it merged KIII into a new KHC; and (3) it ordered the issuance of new stock in New KHC and caused the new stock to be issued to creditors of KHC and KHIII, including the defendant banks, in partial satisfaction of their bankruptcy claims. The Bankruptcy Court's decision confirming the debtor's plan of reorganization was affirmed by the District Court and the Fifth Circuit Court of Appeals.[6] The claims presented in this action were never raised in the Bankruptcy Court.

THE PRESENT CASE

This suit was originally filed in the 67th Judicial District Court, Tarrant

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[6]The Fifth Circuit specifically addressed one issue of the appeal--the retroactive application of the voluntary recusal of the Bankruptcy Judge--which is unrelated to the merits of the underlying confirmation order. The United States Supreme Court denied the Davises' Petition for Writ of Certiorari on August 19, 1988.

County, Texas, on February 2, 1988. It was removed on February 29, 1988, purportedly under 12 U.S.C. § 632 and 28 U.S.C. §§ 1331 and 1441(b). In their amended complaint, Plaintiffs bring thirteen counts alleging RICO violations, securities fraud, fiduciary fraud, civil conspiracy, breach of duty of good faith and fair dealing, tortious interference, and fraud and malfeasance. The amended complaint describes a conspiracy to defraud and deceive the Davis Family, with the ultimate goal of taking over the Davis Family holdings. The underlying events are described as "what is perhaps the most enormous fraud ever perpetrated upon the shareholders and the business associates of a privately held group of companies. It chronicles acts of deceit and manipulation that were calculated to and

did cause substantial harm to Plaintiffs."[7]

When considering the defendants' motion to dismiss, the Court must take the facts alleged in the amended complaint as true. Fed.R.Civ.P. 12(b)(6). According to the complaint, in 1982, when the energy business began to go into a recession, the banking community changed its usual lending philosophy. Bankers abandoned any good faith intent to work with the energy-related borrowers. Instead, they intended to extract every possible dollar from energy related borrowers, forcing borrowers into liquidation or bankruptcy, in order to acquire the borrower or its assets. In effectuating this intention, Plaintiffs allege that the Banks conspired to not assist the energy-related borrowers

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[7]Plaintiffs' response to motion to dismiss, pg. 1.

in good faith restructuring of their debt. Instead, plaintiffs allege, the Banks, through fraud, deceit, and misrepresentations, induced borrowers to accept terms of restructuring that were impossible to meet, force liquidation or bankruptcy, and acquire the entity or its assets.

A. The Agent Defendants

When the fraudulent scheme began, the KICs' debts amounted to hundreds of millions of dollars. Recognizing a need for financial restructuring, KIII appointed the "Agent" defendants, Morgan Guaranty Trust Company of New York and Security Pacific National Bank as its agents to procure a restructuring loan. The Banks recommended, and KIII management agreed, that the best financial arrangement for KIII at the time would be to restructure most of the unsecured debt

into a $550,000,000.00 unsecured, revolving loan. Security and Morgan were to act as agents to negotiate and implement such an arrangement. Plaintiffs allege that Security and Morgan led KIII to believe that the Banks then holding $494,000,000.00 in the KICs existing debt would form a syndicate to fund the new revolving debt. However, as plaintiffs contend, the actual intent of the Banks was to instill a false belief that good faith restructuring was possible. The agent banks allegedly knew, in accordance with the new fraudulent banking philosophy, that such an arrangement was not possible.

B. The Syndicate Defendants

The "Syndicate" Defendants, Bank of Nova Scotia, Bank of New York, Irving Trust Company, Credit Commercial de France, Marine Midland Bank, American Bank

& Trust Company of New Orleans, First City National Bank-Houston, MBank-Dallas, MBank-Fort Worth, Bank of Oklahoma, First Interstate Bank of California, FirstRepublic Bank Dallas, FirstRepublic Bank Fort Worth, Texas American Bank of Fort Worth, Lloyds Bank of California, Continental Illinois National Bank, and First National Bank of Oklahoma City, held approximately $494,000,000.00 in existing debt of the KICs. These were the Banks which the "Agent defendants" represented would form a syndicate to fund debt restructuring for the KICs.

The complaint further describes what plaintiffs characterize as the Banks' most common and successful stratagem."[8] That is, to feign agreement as to basic terms of the agreement, obtain concessions from

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[8]Plaintiffs' amended complaint, pg 20.

KIII and then renege on the agreement using the concessions for leverage to coerce more onerous terms. The complaint describes other methods to effectuate the Banks' ultimate goal--dragging out negotiations, a "Credit Override Agreement Episode," and a "Tax Refund Episode." The "Syndicate" allegedly formed an "enterprise" known as the "Steering Committee" to effectuate the plan. The Steering Committee's alleged purpose was to represent the Syndicate in connection with its dealings with the KICs, later becoming the "de facto" unsecured creditors committee and presently the "de facto" board of directors of the New KHC.

C. The Conspirator Defendants

The "Conspirator" defendants are MBank-Houston, First City National Bank Fort Worth, Seattle First National Bank, Den Norske Credit Bank-Norway, and Chase

Manhattan Bank. At a time prior to April 1, 1986, the "Conspirator" defendants allegedly agreed to join and assist the "Syndicate" defendants in the fraudulent forced sale of the stock of the companies by freezing the Davis Family out of the companies. After the Banks had allegedly extracted all of the cash out of the KICs--approximately $55,000,000.00--they decided to acquire the KICs or their assets by filing the involuntary bankruptcy petitions against the KICs.

D. Individual Defendants

Defendants Robinson, on behalf of Security, and defendant Payne on behalf of Morgan Guaranty, allegedly made false representations concerning terms of the restructuring agreement.

MOTION TO DISMISS

The defendants have moved the Court to dismiss the complaint under Rule 12 of

the Federal Rules of Civil Procedure, or for summary judgment under Rule 56. The defendants' motion is based on four grounds. First, defendants allege that the principles of res judicata and collateral estoppel preclude plaintiffs from bringing this action. Every claim, defendants argue, was, or could have been, raised in the bankruptcy proceeding, essential issues were in fact litigated in the bankruptcy proceedings, and thus, res judicata and collateral estoppel bar further litigation. The second ground is based on a lack of standing. Defendants contend plaintiffs lack standing to assert the claims because the claims belong to the corporation. As shareholders, defendants point out, any harm caused to the corporations could have only indirectly injured the Davis Family plaintiffs. The standing of the Corporate

plaintiffs has also been challenged. Third, defendants argue that plaintiffs are time barred under Section 1144 of the Bankruptcy Code, which provides that fraud claims must be asserted within 180 days from the order of confirmation. Finally, defendants allege that plaintiffs have failed to state a cause of action upon which relief can be granted because the State of Texas does not recognize prima facie tort as a viable cause of action.

The Court will consider the motion as a motion to dismiss, considering all asserted facts in the amended complaint as true and construe all facts in the light most favorable to the plaintiffs. The amended complaint will be dismissed only if "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41

(1957).

STANDING

Because standing is the threshold issue, the Court will consider it first. The issue of standing has been raised with respect to Davis Family plaintiffs and the Corporate plaintiffs with respect to every claim.

I. Standing of the Davis Family

A. RICO

Plaintiffs assert four counts of violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968. Counts one and and two list as predicate acts mail fraud, wire fraud, and a violation of Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5. The predicate acts supporting counts three and four include mail fraud, wire fraud, and a violation of Texas Penal Code Annotated § 32.43 (Vernon

1974)(commercial bribery).

Standing to assert a RICO claim is described in the statute as follows: "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore . . . ." 18 U.S.C. § 1964(c). While § 1964(c) sets forth the RICO standing requirements, non-RICO standing requirements--derived from state law and the Bankruptcy Code--have been incorporated into the civil RICO statute on occasion. When the non-RICO requirements are applied, they must be met in addition to the requirements of § 1964(c). In analyzing the standing issue, the Court will employ the two-part test adopted by the Fifth Circuit in Ocean Energy II, Inc. v. Alexander & Alexander, Inc., 868 F.2d 740, 746 (5th Cir. 1989). The first inquiry is whether any non-RICO

standing requirements apply and, if so, whether such requirements have been satisfied. Second, if non-RICO standing requirements have been satisfied, of if none apply, the inquiry is whether plaintiffs have suffered injuries "by reason of" the commission of a predicate act as required by §1964(c). Id. at 746.

This case, which involves nonderivative claims of shareholders, presents an occasion in which non-RICO standing requirements must be satisfied.[9] In a nonderivative shareholder action, the

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[9] As the court recognized in Ocean Energy II, the Fifth Circuit has consistently held that "shareholders may not bring a RICO action where the racketeering activity was directed against the corporation, where the injury to the shareholders merely derived from and thus was not distinct from the injury to the corporation, and where state law provided that the sole cause of action accrued to the corporation." 868 F.2d at 744 (citations omitted).

standing requirements of state law determine whether a shareholder may maintain a claim for an injury sustained by the corporation. In McDonald v. Bennett,[10] the Fifth Circuit recognized the long-standing Texas rule that a stockholder may not maintain an action to recover damages sustained by the corporation.[11] A shareholder may,

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[10]674 F.2d 1080 (5th Cir. 1982).

[11]The law in Texas is clear:

As a general rule an action to redress or prevent injuries to the corporation cannot be maintained by a stockholder or the body of stockholders in their own names or in the corporate name, but the action must be brought by, and in the name of, the corporation itself. This is true, although the injury to the corporation may incidentally result in the destruction or depreciation of the value of the stock. And the fact that the complaining stockholder is the owner of all or substantially all of the capital stock does not enlarge his rights in this respect. The stockholders cannot as individuals recover on a cause of action vested in the corporation, although all unite in the action.

however, maintain an action for the violation of a duty owed directly to the shareholder as an individual.[12]

McDonald v. Bennett, 674 F.2d at 1085, quoting Stinnett v. Paramount-Famous Lasky Corp., 37 S.W.2d 145, 149 (Tex. Comm'n App. 1931, holding approved). See, Schoellkopf v. Pledger, 739 S.W.2d 914 (Tex.App.--Dallas 1987), rev'd on other grounds, Pledger v. Schoellkopf, 762 S.W.2d 145 (Tex. 1988).

[12]Empire Life Ins. Co. v. Valdak Corp., 468 F.2d 330, 335 (5th Cir. 1972); Cullum v. General Motors Acceptance Corp., 115 S.W.2d 1196 (Tex.Civ.App.--Amarillo 1938, no writ).,

> The [Stinnett] rule is not sufficiently comprehensive to include within such suits damages arising from wrongful acts merely because the acts complained of resulted in damage both to the corporation and to the stockholder. Such a suit is permitted only when the wrongs are such as to give to the stockholder personally a right of action. If the injuries complained of are such as to give to the corporation a cause of action upon damages occasioned to it, the stockholder has no right to bring suit therefore, but if there is a contract or other liability of which the stockholder personally is the beneficiary, the cause of action arises to him as with any other cause of action he might have under the

Therefore, the ability of a shareholder to bring a nonderivative action hinges on whether the asserted right is personal to the shareholder. A shareholder is certainly harmed financially when the price of his stock suffers, but the question of standing does not turn on injury alone. Rather, the question depends on the nature of the injury. Standing to assert a nonderivative claim involves a direct--indirect injury analysis. A shareholder who has been injured only indirectly may not bring suit but must await or encourage the directly injured corporation to assert a claim.

The law of the Fifth Circuit is abundantly clear that an indirectly injured shareholder may not sue for RICO

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same circumstances.

Id. at 1201.

injuries which were sustained by the corporation. The Fifth Circuit enunciated this rule in Adams-Lundy v. Ass'n of Pro. Flight Attendants, 844 F.2d 245 (5th Cir. 1988), and reiterated its position in National Enter., Inc. v. Mellon Fin. Serv. Corp., 847 F.2d 251 (5th Cir. 1988).[13] In

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[13]In National Enterprises, counter-plaintiff lacked a cognizable injury resulting from the RICO conduct and therefore lacked standing to bring suit. Basing its decision on Sedima v. Imrex, 473 U.S. 479 (1985), the Fifth Circuit explained that RICO damages must flow from the predicate acts which form the basis of the RICO claim. Because the counter-plaintiff "was not injured by the conduct constituting the violation, nor was the harm it suffered caused by the predicate acts," it lacked standing to bring a RICO action against a party who was a virtual stranger. National Enterprises, 847 F.2d at 254.

Shareholders have repeatedly been denied standing to bring actions for injuries sustained by the corporation: Roeder v. Alpha Industries, Inc., 814 F.2d 22 (1st Cir. 1987)(shareholder cannot bring action for injuries sustained by the corporation); Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843 (2d Cir.) cert. denied, 479 U.S. 987 (1986) (shareholders denied standing to assert RICO claim); Stevens v.

Adams-Lundy, the Fifth Circuit adopted the Second[14] and Seventh[15] Circuit holdings on standing of an indirectly injured party. Although Adams v. Lundy involved a suit by the member of a labor union against those who allegedly committed RICO injuries against their union, the court found the standing issue analogous to a derivative

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Lowder, 643 F.2d 1078 (5th Cir. 1981)(shareholder's injury arises from loss of value of stock as a result of injury to the corporation); Crocker v. FDIC, 826 F.2d 347 (5th Cir.) cert. denied. 485 U.S. 905 (1987) (shareholder has no standing if the alleged injury is based on a diminution in the value of stock); Warren v. Manufacturers Nat'l Bank, 759 F.2d 542 (6th Cir. 1985); Gaff v. FDIC, 814 F.2d 311 (6th Cir. 1987)(shareholder denied standing to assert derivative action under the federal banking laws).

[14]Rand v. Anaconda-Ericsson, Inc. 794 F.2d 843 (2d Cir.) cert. denied, 479 U.S. 987 (1986)(shareholders lack standing to maintain RICO action for injuries incurred by corporation).

[15]Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985)(indirectly injured taxpayers lacked standing under RICO).

suit by shareholders against those who allegedly committed RICO injuries to the corporation:

> Of course, stockholders cannot sue in their own name for diminution in the value of their stock; a decrease in stock value does not provide sufficient direct injury for the stockholder to sue in his own right. This Circuit, as well as other circuits, have declined to allow stockholders to bring individual claims under RICO for diminution in the value of the corporation. A RICO action to recover for injury to the corporation "is a corporate asset, and shareholders cannot bring it in their own names without impairing the rights of proper claimants to such assets." In a RICO case, "an indirectly injured party should look to the recovery of the directly injured party, not to the wrongdoer for relief."

Id. at 250. (citations omitted)

Defendants argue that the plaintiffs lack standing to bring the RICO claims because the plaintiffs' only alleged injury is the diminution in the value of their stock in the KICs. Therefore, the cause of action is an asset belonging

solely to the corporations. Plaintiffs, however, have described their injury as a direct one, having directly suffered as a result of the wrongful actions of the Banks.

The amended complaint alleges that the plaintiffs were injured in their business and property but does not allege the source of their injury.[16] Under the heading of "Direct Damages Sustained by the Davis Family," however, the amended complaint alleges that the "Davis Family stock, together with that owned by T. Cullen Davis, in the KICs had a value of

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[16] In Counts One through Four, the amended complaint simply alleges that the Davis Family was injured in the amount of $300,000,000.00. However, in Count Seven, alleging fraudulent manipulation of stock value, plaintiffs candidly declare that the "fraud directly resulted in the loss of value of the stock in the KICs held by the Davis Family in the amount of at least $300,000,000.00 for which the members of the Syndicate are jointly and severally liable to the Davis Family."

at least $400,000,000.00." (Amended Complaint ¶ 84).

Plaintiffs have asserted in their briefs and at oral argument that they are not seeking the diminution in the value of the stock but are attempting to recoup the damages that were caused by the fraud that took the value of the stock to zero--what plaintiffs have termed the "fraudulent loss of the value in the stock." The Court finds no distinction in these types of injuries. It does not matter how the decrease in value occurred--whether by fraud, loss of market share, or by other means--and it does not matter that the perpetrators subjectively intended to harm the shareholders by depriving them of their holdings.[17] In the end the result

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[17] Green v. Victor Talking Mach. Co., 24 F.2d 378 (2d Cir.) cert. denied, 278 U.S. 602 (1928) (malicious intent to damage shareholder immaterial and does not

is the same--the stock has decreased in value; the shareholders are injured by the decreased value of their stock; and the cause of action belongs solely to the corporation.

In essence, plaintiffs are requesting the Court to ignore the presence of the corporations--to look at them with x-ray vision--and declare the shareholders the victims of the RICO violations. Although Plaintiffs have long enjoyed the protections of the corporate veil, they would now have the Court penetrate the veil at a time when their immediate interests can perhaps be served. As demonstrated above, however, the law does not allow a meshing of identities of these two distinct legal persons.

Plaintiffs further attempt to bring

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give rise to an independent cause of action).

their RICO claims within three claimed exceptions to the indirect injury rule. The first is asserted under the theory that a shareholder may assert an action for the violation of a duty owed directly to the shareholder as an individual. As discussed above, a shareholder may maintain an action for the violation of a duty owed directly to the shareholder as an individual. However, plaintiffs have failed to articulate a cognizable direct injury. As the argument goes, the defendants' fraud imposed a direct injury upon the shareholders, stemming from a duty owed directly to them as shareholders. The duty, plaintiffs allege, arises from the intent to acquire, and once there is an intent to acquire stock, there arises a duty to tell the shareholders of such intent and a corollary duty not to commit fraud.

Plaintiffs rely on Empire Life Ins. Co. v. Valdak Corp., 468 F.2d 330 (5th Cir. 1972), in support of their theory. They seem, however, to have misinterpreted the holding of Empire.

In Empire, the court allowed the plaintiff, a shareholder who had pledged his stock as collateral, to seek damages as pledgor for the fraudulent depletion of the stock collateral. Plaintiffs' have distorted the holding of Empire by unabashedly asserting that the duty the court recognized was "the duty that a party seeking to acquire stock owes the corporation's shareholders, a duty to refrain from fraudulently causing the stock to diminish in value in order to acquire the stock for less money." (Plaintiff's Response, pg. 123). This is simply a misrepresentation of the Empire holding. Empire did not create a new

cause of action as the plaintiffs have suggested. It merely recognized the pledgor's right to assert a cause of action against a pledgee for the fraudulent depletion in the collateral. The facts in the present case are not comparable to those in Empire.

Secondly, plaintiffs contend that the Banks placed themselves in control of KHC and KIII, dominated the activities of the corporations, thus becoming de facto directors of the corporations.[18] As de facto directors, plaintiffs maintain, the Banks owed a fiduciary duty directly to the shareholders, a breach of which creates a direct injury, giving plaintiffs standing "not only to redress the fiduciary fraud but to redress the

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[18] Although this argument was asserted in the response to defendants' motion to dismiss, the amended complaint does not assert such a claim.

attendant mail and wire fraud through RICO."[19] Assuming the Banks were de facto directors, the law of the Fifth Circuit is clear that a cause of action for breach of directors' fiduciary duties is a corporate asset. Gearhart Indus., Inc. v. Smith Int'l, Inc., 741 F.2d 707 (5th Cir. 1984). A shareholder cannot bring such an action individually or on behalf of the corporation, except in a properly asserted derivative suit.

Plaintiffs' third argument is based on the theory that an indirectly injured party may prosecute an action when the directly injured party is controlled or in the hands of the wrongdoer. Plaintiffs rely on dictum in the case of Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985), to support their theory, although no court--

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[19] Plaintiff's Response, pg. 114.

not even the Carter court--has made this theory the basis of its holding. In Carter, the Seventh Circuit analogized a principle of antitrust law to the RICO claim, citing Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), in which the Supreme Court commented in a footnote that an indirectly injured purchaser might be permitted to pursue a pass-on defense "where the direct purchaser is owned or controlled by its customer." Id. at 736 n. 16. The Seventh Circuit remarked:

> Doubtless indirectly injured parties could recover under RICO when they show that the directly injured party was under the continuing control or influence of the defendant or his henchman.

Carter, 777 F.2d at 1178.

The Carter court did not apply this theory, but found that the plaintiffs did not offer to make a showing, and indeed could not have made such a showing,

because the directly injured party had already initiated a suit. Assuming this theory valid, plaintiffs have nonetheless failed to assert any factual allegations in support of such a theory. The amended complaint alleges only that the Banks conspired to control the corporations, not that the corporations were ever actually in continuous control, until after the confirmation of the plan of reorganization in bankruptcy. In fact, the corporations were in bankruptcy for over 21 months before the plan was confirmed, during which time Davis Family members were in control of the corporations as debtors in possession.

Because the Davis Family cannot meet the non-RICO standing requirements, the Court need not address the "by reason of" requirements under the statute itself.

B. Securities Fraud

The Davis Family plaintiffs have sued the "Agent" and "Syndicate" Banks for violating § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) (1981) and its enabling rule, Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5 (1988), and all of the Banks for aiding and abetting the violation of the Rule. Rule 10b-5 provides as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business

> which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

Id.

The Fifth Circuit has held that there are three basic elements in 10b-5 actions: (1) conduct by the defendants proscribed by the rule; (2) a purchase or sale of securities by the plaintiffs "in connection with" such proscribed conduct; and, (3) resultant damages to the plaintiffs. Sargent v. Genesco Inc., 492 F.2d 750, 759 (5th Cir. 1974) (footnote omitted).

In Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), the Supreme Court followed the 23 year old decision of Judge Augustus Hand[20] and held that the

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[20] Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952).

plaintiff class in a Rule 10b-5 action is limited to actual purchasers and sellers of securities.[21] Moreover, an action

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[21] Justice Rehnquist explained the principle classes of potential plaintiffs which were barred by the Birnbaum rule:

> First are potential purchasers of shares, either in a new offering or on the Nation's post-distribution trading markets, who allege that they decided not to purchase because of an unduly gloomy representation or the omission of favorable material which made the issuer appear to be a less favorable investment vehicle than it actually was. Second are actual shareholders in the issuer who allege that they decided not to sell their shares because of an unduly rosy representation or a failure to disclose unfavorable material. Third are shareholders, creditors, and perhaps others related to an issuer who suffered loss in the value of their investment due to corporate or insider activities in connection with the purchase or sale of securities which violate Rule 10b-5. It has been held that shareholder members of the second and third of these classes may frequently be able

under Rule 10b-5 may only be brought if the fraud was committed "in connection with the purchase or sale of any security." Rule 10b-5. In order to have standing to bring a Rule 10b-5 action, the plaintiff must have been an actual buyer or seller of securities, and the alleged fraud must have occurred "in connection with" such purchase or sale. Because there is not even an allegation of an actual purchase or sale of securities, plaintiffs' securities fraud claim must be

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> to circumvent the Birnbaum limitation through bringing a derivative action on behalf of the corporate issuer if the latter is itself a purchaser of securities. See, e.g., Schoenbaum v. Firstbrook, 405 F.2d 215, 219 (2d Cir. 1968, cert. denied, sub nom. Manley v. Schoenbaum, 395 U.S. 906 (1969).

Blue Chip Stamps, 421 U.S. at 737-738.

dismissed.

However, plaintiffs claim that they fall within a narrow exception to the actual sale or purchase requirement. The exception is known as the "forced sale" doctrine. Plaintiffs contend that there was a "forced sale" of the stock as a result of the judicially ordered cancellation in bankruptcy for which they received no consideration. The "forced sale" was allegedly a result of the fraud perpetrated upon them by the Banks--fraud which forced the corporations into bankruptcy, which forced the sale of the securities to satisfy creditors. Therefore, plaintiffs proffer, they are sellers of securities and entitled to sue for any violations in connection with the forced sale.

The "forced sale" doctrine was recognized by the Second Circuit in Vine

v. Beneficial Fin. Co.[22] Vine involved a statutory short form merger of Crown Finance Company, Inc. ("Crown") into the defendant, Beneficial. The complaint alleged that the corporation's officers and directors, and holders of Crown class B stock, conspired with the Beneficial to divert more than a fair share of the price paid for the corporation. As a result, the plaintiff, a holder of class A stock in Crown, was forced to either surrender his stock to Crown's cash offer or pursue his right of appraisal. The net effect, the court held, was that plaintiff must become a party to a sale if he wants to realize any value from his stock. Requiring him to actually sell as a condition to bringing suit is a needless formality. "Due to defendants' acts,

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[22] 374 F.2d 627 (2d Cir.), cert. denied, 389 U.S. 970 (1967).

Crown has disappeared, and plaintiff's stock has, in effect, been involuntarily converted into a claim for cash."

The Fifth Circuit has also recognized the "forced sale" doctrine and explicitly extended the principle from a merger to a liquidation in Coffee v. Permian Corp., 434 F.2d 383 (5th Cir. 1970), cert. denied, 412 U.S. 920 (1973).[23] "In both instances the shareholder 'as a practical matter' has no choice but to surrender his interest in the corporation and to exchange his shares for cash." Id. at 386. In Coffee, the corporation was

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[23] See also, Dudley v. Southeastern Factor and Fin. Corp., 446 F.2d 303 (5th Cir.), cert. denied, McDaniel v. Dudley, 404 U.S. 858 (1971) (plaintiff, whose investment in a going enterprise was commuted to a right to payment of money by virtue of a plan of dissolution and liquidation of the corporation, was a "seller within the meaning of the securities statute for purpose of standing to sue).

substantially liquidated by the majority shareholder and the corporate assets appropriated for his own benefit. The court acknowledged the applicability of the doctrine in this situation because plaintiff's stock had been converted from an interest in a going enterprise to a claim for cash by virtue of the liquidation. The Fifth Circuit adopted the reasoning of Vine, turning on the question of "whether the shareholders, as a result of the statutory merger, have in substance become sellers despite the fact that they still hold stock certificates in a nonfunctioning corporation."

The Fifth Circuit again applied the principle to a corporate liquidation in Alley v. Miramon, 614 F.2d 1372 (5th Cir. 1980). In Alley, the controlling shareholder perpetrated a fraudulent scheme whereby he obtained Alley's stock,

changed the name of the corporation, and liquidated the successor corporation without notice to Alley, converting the liquidation proceeds to his own use. When the scheme was complete, Alley's shares were converted to claims for cash in a nonfunctioning corporation.

The "forced sale" doctrine, however, has never been extended to a judicially ordered cancellation of stock in connection with a plan of reorganization in bankruptcy. Indeed, the question has been addressed by a Circuit Court only once, and it has been answered with a resounding "no."[24]

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[24] The issue of whether a bankruptcy liquidation is a § 10(b) sale has also been confronted and rejected in Ingenito v. Bermec Corp., 376 F. Supp. 1154 (S.D.N.Y 1974) (in the circumstances presented, a bankruptcy is not a § 10(b) sale in that the fraudulent activity had no connection with the bankruptcy and was not committed for the purpose of causing the bankruptcy) and Teltronics v.

In Rand v. Anaconda-Ericsson, Inc.,[25] the plaintiffs were shareholders in Teltronics Services, Inc. ("Teltronics") and alleged that several defendants planned or aided in a plan to force Teltronics into bankruptcy. Defendant Ericcson was Teltronic's supplier and principle creditor. Ericcson accepted financing from Teltronics in the form of notes payable, and Ericcson guaranteed payment on the notes in return for a security interest in Teltronics' revenues. The complaint alleged that Ericcson led Teltronics to believe that it did not need to make an interest payment then due on the notes. Teltronics did not make the

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Anaconda-Ericcson, Inc., 587 F. Supp. 724 (E.D.N.Y. 1984), aff'd, In re Teltronics Serv., Inc., 762 F.2d 185, 193 (2d Cir. 1985), an earlier case arising from the same Teltronics litigation as Rand.

[25] 794 F.2d 843 (2d Cir.), cert. denied, 479 U.S. 987 (1986).

payment, defaulted on the note, and the banks accelerated payment. As guarantor, Ericsson paid the sums due. Teltronics, unable to find alternative financing, was then forced into involuntary bankruptcy by its creditors.

As the complaint alleged, Ericcson and the other defendants had engaged in a scheme to force Teltronics into bankruptcy. Ericcson then announced in a press release that Teltronics was in default and that Ericcson was commencing legal action to recover payment for the notes. This was part of a scheme to divert other corporate suitors and thus assured that Ericcson could take over Teltronics' business. The release was also the reason Teltronics could not secure financing and was forced into involuntary bankruptcy. Once in bankruptcy, the shares of stock were

converted into claims for cash. In response to a challenge of their standing to bring a Rule 10b-5 action, the shareholders alleged that they were "forced sellers" of the stock and that the press release was "in connection with" the sale of securities.

The Second Circuit did not agree with the shareholders and declined to expand the "forced sale" doctrine beyond the conventional securities fraud transactions resulting in an intra-firm freeze-out of one group of investors by another, holding that the case did not present "even the incidental involvement of securities." Writing for the court, Judge Winter stated, "[o]nly the filing for bankruptcy in September 1979, viewed in the most tortured fashion, purports to link the conduct of the defendants to the purchase or sale of a security." Id. at 847.

The Court agrees with the reasoning and the concerns of the Rand court, and perceives no necessity in expanding the application of the "forced sale" doctrine as far as plaintiffs suggest.[26] As the Rand court recognized, extending the "forced sale" doctrine to a filing of bankruptcy would create "a virtually

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[26] The Second Circuit stated its concerns as follows:

> Plaintiff's claim is based upon a virtually limitless legal theory that would confer any fraudulent conduct resulting in a corporate bankruptcy into securities fraud ... [t]he perversity of [the shareholders'] argument is further demonstrated by consideration of the effect it would have, if adopted, on bankruptcy proceedings ... a major corporate asset, the claim against Ericsson, would by virtue of the bankruptcy itself be shared by the bankruptcy trustee and the shareholders as well.

Rand, 794 F.2d at 848.

limitless legal theory that would convert any fraudulent conduct resulting in a corporate bankruptcy into securities fraud." Id. at 848. Under this theory, the fraudulent conduct need not remotely relate to the sale of securities as the statute requires--application of the securities laws would just kick in by virtue of the filing for bankruptcy. The court further commented on the fact that the securities laws would not come into play except by virtue of the filing for bankruptcy. For instance, if the KICs had not filed bankruptcy, the Davis Family would have suffered the same diminution in the value of their stock but would not have been able to assert a securities fraud claim.[27]

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[27] See Rand, 794 F.2d at 848 for the effects of an extension of the "forced sale" doctrine on the bankruptcy proceeding itself.

The Court determines that the judicially ordered cancellation of the plaintiffs' stock was not a "forced sale" of securities, and the fraud was not committed "in connection with" a securities transaction. Accordingly, the Davis Family plaintiffs lack standing to assert Count 5 under Rule 10b-5.

In Count 6, the Davis Family plaintiffs claim that all defendants aided and abetted in the commission of securities fraud. An aiding and abetting violation requires that there be: (1) a violation of Rule 10b-5; (2) a general awareness on the part of defendant of his role in improper activity; and (3) a knowing and substantial assistance in the primary violation.[28] The existence of a

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[28] Cleary v. Perfectune, Inc., 700 F.2d 774 (1st Cir. 1983); Woodward v. Metro Bank of Dallas, 522 F.2d 84 (5th Cir. 1975).

securities violation is a prerequisite to aiding and abetting liability.[29] Because the Court has determined that the plaintiffs lacked standing to bring a Rule 10b-5 claim, their claim of aiding and abetting must also fail.

C. Fraudulent Manipulation of Stock Value

In Count 7, the Davis Family asserts a claim referred to as fraudulent manipulation of stock value. The factual allegations supporting this claim are the same events involved in the alleged overall scheme to defraud.[30] The nature

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[29] Iroquois Industries, Inc. v. Syracuse China Corp., 417 F.2d 963, 970 (2d Cir. 1969), cert. denied, 399 U.S. 909 (1970).

[30] Count 7 alleges, "In connection with their desire to acquire the Companies, the Syndicate engaged in repeated fraudulent activities that have been described in detail in many sections of this Complaint. This fraud directly and proximately resulted in the loss of

of the injury alleged by the Davis Family are also the same--diminution in stock value. As discussed above, the law in Texas clearly prohibits a stockholder from maintaining and action for a diminution in the value of his stock.[31] Accordingly, the Court determines that the plaintiffs lack standing to assert Count 7.

D. Civil Conspiracy

In Count 9, the Davis Family plaintiffs allege civil conspiracy by the "Syndicate" and "Conspirator" defendants in conjunction with the acts underlying Counts 5, 6 and 7. As Counts 5, 6 and 7 have been dismissed for lack of standing, Count 9 is also DISMISSED with prejudice.

E. Fiduciary Fraud

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value of the stock of the KICs held by the Davis Family . . . ."

[31] See, McDonald v. Bennett, 674 F.2d 1080 (5th Cir. 1982).

In Count 8, the Davis Family plaintiffs allege that the Steering Committee, as constructive directors of the KICs breached its fiduciary duty to the shareholders of the corporation. Again, assuming the Steering Committee owed a duty and breached it, the duty was owed to the corporation, not the shareholders. As the Fifth Circuit clearly held in Gearhart Indus., Inc. v. Smith Int'l, Inc.,[32] "a cause of action for breach of directors' fiduciary duties belongs to the corporation and cannot be brought by a stockholder in his own right, nor can the shareholder directly prosecute the suit in the name of the corporation." 741 F.2d at 721. Accordingly, the Davis Family plaintiffs, as shareholders of the KICs, lack standing to assert an action

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[32] 741 F.2d 707 (5th Cir. 1984).

for fiduciary fraud.

II. Standing of the Corporate Plaintiffs

The Corporate plaintiffs bring separate claims for RICO violations, conspiracy, breach of duty of good faith and fair dealing, and tortious interference with their business relationship with the KICs.

A. RICO

As the complaint alleges, the "Syndicate" banks entered into a conspiracy calculated to harm the Corporate plaintiffs in the hope of coercing the KICs. In the RICO counts (Counts 1-4), plaintiffs assert the same violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, as the Davis Family plaintiffs, including the same predicate acts. Counts one and two list as predicate acts, mail fraud, wire fraud, and the violation of

Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1986). The predicate acts supporting Counts three and four include mail fraud, wire fraud, and violation of Texas Penal Code Annotated § 32.43 (Vernon 1974) (commercial bribery).

The Court will make a standing determination based on the same RICO standing analysis as described above, employing the same two-part test adopted by the Fifth Circuit in Ocean Energy II. The first inquiry is whether any non-RICO standing requirements apply and, if so, whether such requirements have been satisfied. Non-Rico standing requirements have been applied in derivative claims, claims analogous to derivative claims, and in cases where creditors are asserting RICO claims against the bankrupt debtor.[33]

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[33] See Ocean Energy II, 868 F.2d at 744-745 (citations omitted).

The indirect injury requirement has also been applied to deny RICO standing in a suit where taxpayers were suing for injuries sustained by the county[34] and in a case where a creditor was suing for RICO violations committed against a bankrupt debtor.[35]

The Corporate plaintiffs do not fall within a traditional category of cases employing non-RICO standing requirements. Therefore the statutory requirement will be examined. The appropriate inquiry is whether plaintiffs have suffered injuries

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[34] Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985).

[35] National Enter. v. Mellon Fin. Serv. Corp., 847 F.2d 251, 254 (5th Cir. 1988). In National Enterprises, the supplier and creditor of a bankrupt debtor sued the debtor's lending institution for RICO violations. The Fifth Circuit denied standing to the indirectly injured creditor, accepting the holding of Adams-Lundy as precedent in the Circuit for denying standing to the creditor of an alleged RICO victim.

"by reason of" the commission of a predicate act as required by § 1964(c).[36] The Supreme Court interpreted § 1964(c) in Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985). The Court rejected the notion that a plaintiff must have suffered a "racketeering injury." Only persons injured "by reason of" the commission of the predicate acts have standing to bring a RICO action. In addition, the Court held,

> [T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation . . . . [T]he compensable injury necessarily

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[36]Standing to assert a RICO claim is described in the statute, 18 U.S.C. § 1964(c), as follows: "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore . . . ."

> is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise . . . . Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

Id. at 496, 497.

Interpreting the Sedima causation requirement, the Fifth Circuit rejected the conclusion that the nexus between the injury and the predicate act be "direct,"[37] holding that such a

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[37]Contra Morast v. Lance, 807 F.2d 926 (11th Cir. 1987) (only those injuries which directly flow from the predicate acts are compensable under RICO); Nodine v. Textron, Inc., 819 F.2d 347 (1st Cir. 1987) (following Morast); and Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806 (7th Cir. 1987) (direct injury requirement

requirement may be overly restrictive. Zervas v. Faulkner, 861 F.2d 823 (5th Cir. 1988). In Zervas, the court expressly held that the "by reason of" language requires not only factual, "but for" causation, but also a legal, "proximate" cause. The legal cause determination is one of law for the Court.[38]

The Corporate plaintiffs allege in Counts 1-4 that they were injured in their business and property in the amount of $20,000,000.00 as a result of the RICO

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applied).

[38]See, Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir. 1988) (the claimed predicate acts were "not so significant and important a cause of the plaintiffs' loss" as to authorize RICO recovery); Sperber v. Boesky, 849 F.2d 60 (2d Cir. 1988) (legal liability should not extend as far as factual causation. Although it was assumed that the injury was a foreseeable result in fact of the predicate acts, RICO recovery was denied because the connection between the two was overly attenuated).

activities of the defendants. The RICO counts are the same counts asserted by the Davis Family plaintiffs, supported by the same predicate acts, wherein the entire fraudulent scheme was to obtain control of the KICs. Assuming that this was the scheme and that it was indeed effectuated in violation of the RICO statutes, the Corporate plaintiffs may not bring suit because they were not injured "by reason of" such violations.

The Corporate plaintiffs may have suffered injury in fact as a result of the RICO violations, just as the shareholders in fact suffered. However, the plaintiffs must demonstrate more than a foreseeable injury in fact. In the present case, the Corporate plaintiffs and the KICs enjoyed advantageous business relations because they were commonly owned by Davis Family members. When the KICs failed, the

Corporate plaintiffs suffered in that they no longer enjoyed the advantageous business relationship with the KICs. However, the injury the Corporate plaintiffs may have suffered is too attenuated and speculative to have been caused "by reason of" the predicate acts. Acceptance of this expanded definition of the causation requirement would confer RICO standing to anyone who had enjoyed a profitable business relationship with the KICs.

B. Civil Conspiracy

In Count 10, the allegations are that the defendants conspired, through their overall fraudulent scheme, to injure the Corporate plaintiffs. The conspiracy was allegedly calculated to harm the Corporate plaintiffs by orchestrating a financial crisis in furtherance of the scheme to defraud the KICs. The direct action

alleged by the plaintiffs is that the Banks agreed not to loan money to the Corporate defendants. However, plaintiffs have alleged no existing agreement to loan money. The mere refusal to loan money is not an actionable claim. See, In re W.T. Grant Co., 699 F.2d 599, 610 (2d Cir.), cert. denied, 464 U.S. 822 (1983).

C. Breach of Duty of Good Faith and Fair Dealing

In Count 11, the Corporate plaintiffs allege that defendants TAB and Interfirst Fort Worth breached a duty of good faith and fair dealing as lenders of the Corporate plaintiffs. The law in Texas is abundantly clear--there is no duty of good faith and fair dealing between a lender and a debtor absent an express agreement or by operation of law.[39] This action

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[39]English v. Fischer, 660 S.W.2d 521 (Tex. 1983).

does not present a case where the duty will be imposed where a "special relationship" exists between the parties.[40]

D. Tortious Interference

In Count 12, the Corporate plaintiffs allege that the defendant Banks and the individual defendants interfered with the plaintiffs' advantageous business relationship with the KICs. The Corporate plaintiffs allege that they had an advantageous business relationship with the KICs because of the interlocking ownership of the companies. By effectuating the scheme and divesting the Davis Family of their ownership in the stock, plaintiffs allege, the defendants interfered with that advantageous business

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[40]Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987) (duty of good faith and fair dealing imposed between insurer and its insured).

relationship.

The law of the State of Texas recognizes a cause of action for tortious intereference with contractual relationships and for tortious intereference with advantageous business relationships. The Corporate plaintiffs have asserted only the latter cause of action. By their complaint, however, plaintiffs have failed to state a cause of action for tortious intereference. "Interference with another's business relationship with a third party is actionable only if the intereference is motivated by malice and no useful purpose of the inducing party is subserved." State Nat'l Bank v. Farah Mfg. Co., 678 S.W.2d 661 (Tex. App.--El Paso 1984, writ dism'd by agr.) (citations omitted). The interference alleged in the complaint is an interference with the KICs--the

fraudulent scheme to divest the Davis Family of their stock in the KICs. Because the KICs no longer exits, plaintiffs reason, they can no longer do business with these companies and have therefore been damaged. These tenuous injuries are insufficient to allege a cause of action.

III. Fraud and Malfeasance by the Individual Defendants

This claim, contained in Count 13, is against the individual defendants, John Payne and Donald Robinson. Plaintiffs merely allege that the individual defendants "knowingly and intentionally participated in the frauds described in the portions of this Complaint that are referenced." All causes of action in the complaint have been dismissed for want of standing. Hence, all "referenced portions" no longer exist, and this Count

shall likewise be dismissed.

CONCLUSION

The Davis Family lacks standing to bring their RICO, securities fraud, and state law claims. The Corporate plaintiffs lack standing to bring their RICO and state law claims and have failed to allege a cause of action for tortious intereference. Hence, the plaintiffs' have failed to state a claim upon which relief can be granted, and the claims are hereby DISMISSED. Fed. R. Civ. P. 12(b)(6). The only remaining claims are the defendants' counterclaims and suit for declaratory relief and injunction. The Defendants have represented to the Court that, in the event Plaintiffs' claims are dismissed, Defendants will dismiss their counterclaims. If this is still their intent, the Defendants should promptly file the appropriate documents with the

Court in order to effect the closing of this case.

Signed this 20th day of June, 1990.

ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH W. DAVIS, JR., ET AL.	§	
	§	
V.	§	CIVIL ACTION NO. 4-88-118-E
	§	
MORGAN GUARANTY TRUST COMPANY OF NEW YORK, ET AL.	§	

PLAINTIFFS' AMENDED COMPLAINT

TO THE HONORABLE ELDON MAHON, UNITED STATES DISTRICT JUDGE:

COME NOW KENNETH W. DAVIS, JR., ALANA DAVIS MARSH, individually and as next friend and custodian for TRICIA KAE LAWLER, a minor, ALAN TUCKER DAVIS, individually and as next friend and custodian for ALAN KENNETH DAVIS and JENIECE BREANNE DAVIS, Minors, KAY DAVIS, individually and as trustee for her unborn children, T. C. DAVIS, II, BRIAN KEITH DAVIS, TREY DAVIS, and KAREN DAVIS as next friend and custodian for CHESLEY DAVIS (hereafter the foregoing Plaintiffs will sometimes be referred to collectively as the "Davis Family") GREAT WESTERN

MARKETING COMPANY, KENDAVIS FINANCE COMPANY, a division of Great Western Drilling, and GREAT WESTERN DRILLING COMPANY (hereafter the three immediately preceding Plaintiffs will sometimes be referred to collectively as the "Corporate Plaintiffs"), all acting as Plaintiffs complaining of MORGAN GUARANTY TRUST COMPANY OF NEW YORK, BANK OF NOVA SCOTIA, BANK OF NEW YORK, SECURITY PACIFIC NATIONAL BANK, IRVING TRUST COMPANY, CREDIT COMMERCIAL DE FRANCE, MARINE MIDLAND BANK, AMERICAN BANK & TRUST COMPANY OF NEW ORLEANS, FIRST CITY NATIONAL BANK-HOUSTON, MBANK-DALLAS, MBANK-FORT WORTH, BANK OF OKLAHOMA, TULSA, FIRST INTERSTATE BANK OF CALIFORNIA, FIRSTREPUBLIC BANK DALLAS, FIRSTREPUBLIC BANK FORT WORTH, TEXAS AMERICAN BANK-FORT WORTH, LLOYDS BANK OF CALIFORNIA, FIRST CITY NATIONAL BANK FORT WORTH, SEATTLE

FIRST NATIONAL BANK, DEN NORSKE CREDIT BANK-NORWAY, CHASE MANHATTAN BANK and MBANK-HOUSTON (hereafter the foregoing Defendants will sometimes be referred to collectively as the "Banks"), JOHN PAYNE and DONALD J. ROBINSON, Defendants and would show as follows:

THE DAVIS FAMILY PLAINTIFFS

1. Kenneth W. Davis, Jr. is an individual residing in Tarrant County, Texas.

2. Alana Davis Marsh is an individual residing in Tulsa, Oklahoma.

3. Alan Tucker Davis is an individual residing in Midland, Texas.

4. Kay Davis is an individual residing in Tarrant County, Texas.

5. T. C. Davis, II is an individual residing in Dallas County, Texas.

6. Brian Keith Davis is an individual residing in Dallas County,

Texas.

7. Trey Davis is an individual residing in Tarrant County, Texas.

8. Karen Davis is an individual residing in Tarrant County, Texas.

9. At all times material to this Complaint the above named Plaintiffs owned the majority of stock of Kendavis Holding Company ("KHC") which owned 100% of the stock of Kendavis Industries International, Inc. ("KIII"). Through this ownership, these Plaintiffs owned essentially all of the equity in the a group of corporations that will be referred to in this Complaint as the Kendavis Industry Companies "KICs", a group of subsidiaries and affiliates of KIII and KHC that will be described in more detail later in this Complaint. Throughout this Complaint these Plaintiffs will sometimes be referred to as the

"Davis Family".

THE CORPORATE PLAINTIFFS

10. Great Western Drilling Company is a Texas corporation with its principal place of business in Midland, Midland County, Texas. Great Western Marketing is a Texas corporation with its principal place of business in Fort Worth, Tarrant County, Texas. Kendavis Finance Company is a division of Great Western Drilling with its principal place of business in Fort Worth, Tarrant County, Texas. These three companies will sometimes be referred to in this Complaint as the "Corporate Plaintiffs".

THE AGENT DEFENDANTS

11. Defendant Morgan Guaranty Trust Company of New York ("Morgan") is New York banking corporation with principal place of business in New York, New York. Morgan has appeared in this action.

12. Defendant Security Pacific National Bank ("Security") is a national banking association with its principal place of business in Los Angeles, California. Security has appeared in this action.

13. Hereafter, Morgan and Security will sometimes be referred to as the "Agent Banks" and Morgan as the "Agent."

THE SYNDICATE DEFENDANTS

14. Defendant Bank of Nova Scotia ("Nova Scotia") is a Canadian banking corporation with its principal place of business in Toronto, Ontario, Canada, and with domestic offices in Atlanta, Georgia and Houston, Texas. Nova Scotia has appeared in this action.

15. Defendant Bank of New York is a New York banking corporation with its principal place of business in New York, New York. Bank of New York has appeared

in this action.

16. Defendant Irving Trust Company ("Irving") is a New York banking corporation with its principal place of business in New York, New York. Irving has appeared in this action.

17. Defendant Credit Commercial de France ("Commercial") is a French banking corporation with principal place of business in Paris, France and domestic office in New York, New York. Commercial has appeared in this action.

18. Defendant Marine Midland Bank ("Marine Midland") is a national banking association with its principal place of business in Buffalo, New York. Marine Midland has appeared in this action.

19. Defendant American Bank & Trust Company of New Orleans ("Bank of New Orleans") is a national banking association with its principal place of

business in New Orleans, Louisiana. Bank of New Orleans has appeared in this action.

20. Defendant First City National Bank-Houston ("First City") is a national banking association with its principal place of business in Houston, Texas. First City has appeared in this action.

21. Defendant MBank-Dallas ("Mercantile") is a national banking association with its principal place of business in Dallas, Texas. Mercantile has appeared in this action.

22. Defendant MBank-Fort Worth ("Continental") is a national banking association with its principal place of business in Fort Worth, Texas. Continental has appeared in this action.

23. Defendant Bank of Oklahoma is a national banking association with its principal place of business in Tulsa,

Oklahoma. Bank of Oklahoma has appeared in this action.

24. Defendant First Interstate Bank of California (First Interstate) is a California banking corporation with its principal place of business in Los Angeles, California. First Interstate has appeared in this action.

25. Defendant FirstRepublic Bank Dallas ("Interfirst Dallas") is a national banking association with its principal place of business in Dallas, Texas. Interfirst Dallas has appeared in this action.

26. Defendant FirstRepublic Bank Fort Worth ("Interfirst Fort Worth") is a national banking association with its principal place of business in Fort Worth, Texas. Interfirst Fort Worth has appeared in this action.

27. Defendant Texas American Bank

Fort Worth ("TAB") is a national banking association with its principal place of business in Fort Worth, Texas.

28. Defendant Lloyds Bank of California ("Lloyds") is a California banking corporation with its principal place of business in Los Angeles, California. Lloyds has appeared in this action.

29. The Defendant Banks identified in paragraphs 14 through 28, together with Continental Illinois National Bank ("Continental") and First National Bank of Oklahoma City, will sometimes be referred to in this Complaint as the "Syndicate".

THE CONSPIRATOR DEFENDANTS

30. Defendant MBank-Houston is a national banking association with its principal place of business in Houston, Texas. MBank-Houston has appeared in this action.

31. Defendant First City National Bank Fort Worth ("First City Fort Worth") is a national banking association with its principal place of business in Fort Worth, Texas.

32. Defendant Seattle First National Bank ("SeaFirst") is a national banking association with its principal place of business in Seattle, Washington. Seafirst has appeared in this action.

33. Defendant Den Norske Credit Bank-Norway ("Den Norske") is a Norwegian banking corporation with its principal place of business in Oslo, Norway, and a domestic office in New York, New York. Den Norske has appeared in this action.

34. Defendant Chase Manhattan Bank ("Chase") is a national banking association with its principal place of business in New York, New York. Chase has appeared in this action.

35. The Defendant Banks described in paragraphs 30 through 34 above will sometimes be referred to in this complaint as the "Conspirator Banks".

INDIVIDUAL DEFENDANTS

36. John Payne ("Payne") is an individual residing in New York, New York and may be served with summons and complaint at his place of employment, Morgan Guaranty Trust Company, 15 Broad Street, New York, New York 10005.

37. Donald J. Robinson ("Robinson") is an individual residing in Los Angeles, California and may be served with summons and complaint at his place of employment, 333 South Hope Street, Los Angeles, California 90071.

JURISDICTION AND VENUE

38. This Court has jurisdiction over this complaint pursuant to 12 U.S.C. § 1964(c), 15 U.S.C. § 78aa, 28 U.S.C. §

1331 and pursuant to principles of pendant jurisdiction.

39. Venue is proper in this Court because the Defendants transact their affairs in this District and Division and because the causes of action asserted arose in this District and Division.

SUMMARY OF THIS ACTION

40. This is a suit brought to redress a pattern of fraud that ultimately proximately damaged in the Davis Family in amounts well in excess of $350,000,000.00 and in the Corporate Plaintiffs in excess of $20,000,000.00. The fraud included an ongoing series of coercive and deceptive schemes and artifices. As will be set out in detail below, the Defendants in this action violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), United States Securities Laws, and the Common Law.

FACTS

41. In 1929, Kenneth William Davis, Sr. arrived in Fort Worth and began work for a struggling oil-field supply company that had a handful of employees with small stores in Houston and Fort Worth. Less than a year later he purchased controlling interest in the company for $5,000.00 in cash. That company, Mid-Continent Supply Company, established itself in the booming oil fields of Texas in the 1930's; first in Odessa, Kilgore and Conroe and then Lake Charles, Louisiana and ultimately throughout the major oilfield areas of the United States and many foreign countries. As Mid-Continent Supply Company grew and prospered through boom and bust, Davis began acquiring and founding other companies. In 1936, Ken W. Davis, Sr. purchased George P. Livermore Drilling Co., a corporation known today as Great

Western Drilling. By this acquisition, the Ken Davis family became the first family in the world to own an oilfield supply company that owned a drilling company. Then in 1946, Ken W. Davis, Sr. acquired Tulsa based Loffland Brothers, a contract drilling firm which under Davis' management expanded its United States and international operations and developed the most modern drilling techniques and equipment in the industry. Loffland became the largest drilling contractor in the world.

42. In 1958, Kendavis Industries International, Inc. (KIII) was formed as a vehicle to coordinate the operations and growth of the companies assembled by Ken W. Davis, Sr. Headquartered in Fort Worth, KIII provided support and management services for its affiliated companies.

43. In 1968, Ken W. Davis, Sr. died.

At the time of his death, the companies affiliated with KIII, the "KICs", encompassed 40 plus corporations operating on 6 continents. After their father's death in 1968, Ken W. Davis, Jr., T. C. Davis II and Bill Davis assumed management of the Companies. Bill Davis' interest was acquired in 1973.

44. From 1968 through 1982, KIII and the KICs experienced an impressive and profitable period of growth and diversification. Beyond oil-field supply, manufacturing and drilling related activities, the KICs became involved in commercial printing, air conditioners for automobiles, deisel engine supply and rebuilding for the petroleum industry, marine and trucking industries. The expansion encompassed the manufacture of flexible hoses for aircraft, manufacture of airline highlift catering units and the

world's larget open pit mining trucks, and a firm that became the largest distributor of Cummins diesel engines in the world. The KICs were multifaceted and touched, if not dominated, many of the industries of the United States.

45. Throughout this time, the credit rating and banking relationships of KIII and KICs were respected and considered among the best in the corporate world. Mid-Continent and the KICs borrowed money from banking institutions throughout the world at or below the most favored prime lending rates for corporations and credit was always extended on an unsecured basis. Never on any occasion did Mid-Continent or any KIC fail to meet any negotiated financial obligation.

46. The 1970's brought the Arab oil embargo and this contributed to a severe

downturn in the economies of numerous regions of the United States and Canada, particularly in the Northeast, Great Lakes region and the Pacific Northwest. At the same time, the energy industry in the Southwest, and specifically the State of Texas, experienced phenomenal growth. This was a time in which all facets of the energy industry and energy related industries boomed. This boom attracted countless inexperienced investors, operators and promoters who hoped to capitalize on the surging energy business, as well as the general upward spiral of prosperity that was being experienced by Texas and its neighboring states.

47. Just as inexperienced investors, operators and promoters rushed into the energy field, many out of state lenders, saddled with loan losses suffered in the regional industries they had historically

financed, rushed into the Southwest and, hoping to offset loses and share in what was perceived as easy profits, began attempting to attract energy related customers and make loans in the energy industry. Many of these lenders, including most of the Banks that are headquartered outside Texas and Oklahoma, had no real experience or expertise in oil and gas lending. What limited experience they had acquired was with the most stable and conservative of energy related firms, such as the KICs. Nevertheless, enticed by high interest rates and a boom they perceived to be without end, lenders from all over the United States rushed into the Texas lending market. The Defendant Banks that are from out of state were among the most prominent of the institutions that jumped head first into the Texas lending market. Several of the Defendant Banks,

including Security, First Interstate and Nova Scotia, even opened offices in Texas. As with most out of state lenders, the Banks did not limit their lending to established and prudent energy companies, such as KIII or the KICs, but instead made billions of dollars worth of imprudent loans to speculative new energy related businesses and energy promoters. In fact, lending practices and speculative loans all but ruined several energy related markets, including in particular the market for oil field tubulars and drilling equipment and supplies.

48. The newcomer banks, including the out of state Defendant Banks in this action, had no real commitment to the energy industry or to the economy of the Southwest. Texas and Oklahoma lenders, such as those that are Defendants in this action, were pulled into speculative

lending by the pell-mell entry of out of state money into energy lending. Entrapped by the lure of quick profits and a "boom town" psychology, Texas and Oklahoma lenders (such as TAB, First City, Interfirst and First National of Oklahoma) abandoned their time honored criteria for energy lending and joined the out of state banks in literally throwing money at anyone claiming any relation at all to the energy business.

49. In contrast to the promoters and fly by night newcomers to the energy business, during the boom years the KICs held to a prudent and steady management course, the same course pursued for over fifty years. The success of the KICs is undeniable. By the end of 1981 the KICs and the Corporate Plaintiffs included 85 identifiable business entities, and were represented in more than 400 locations

around the world including companies and/or a presence in over 35 different countries including Germany, Scotland, the Netherlands, England, Japan, France, Austria, Turkey, Morocco, Bolivia, Venezuela, Iran, India, Mexico, Australia, Taiwan, Malaysia, South Africa, Nigeria, Canada, Norway, and Saudi Arabia. The number of employees of KIII and the KICs exceeded 16,000. Total sales in 1981 exceeded 2.2 billion dollars, and the gross profits of the companies exceeded 200 million dollars.

50. Throughout their business history, the Davises and the KICs enjoyed a continuously profitable relationship with their bankers. This relationship had been of the classic "partnership" type of banking so typical in Southwest. It was a relationship based upon honesty, good faith and mutual trust. The KICs and

their bank partners had worked together, sharing the good times and working together to weather the bad. For over 50 years, no bank failed to make money out of a credit or lending relationship with any Kendavis Company. In return for the credit facilities made available over the years, the KICs scrupulously honored every financial commitment and made all payments on the timely basis.

51. Consistent with the "partnership arrangement" and the trust that the KICs vested in their bankers, the KICs provided on a routine basis all pertinent available financial information. The KICs also tendered to all their bankers a standing invitation to personally visit any Kendavis company or property and did, in fact, escort many bankers on private and group tours for any request they made. The KICs further made available quarterly

actual and five year projections for each of the KICs.

52. By the first quarter of 1982, management of the KICs began to recognize a shift in the energy industry. The KICs began to project less optimistic results for the years ahead and made this information known to the Banks. Following the Kendavis tradition of responsive management, several changes were effectuated. KIII was formed as a management consultant company to function within the KICs as outside management-professional advisors would operate outside of a company. To streamline various specialized services needed by each KIC, such as tax experts, auditors, insurance, traffic and finance, KIII functioned on behalf of each KIC offering these and other specialized services to all KICs, thus eliminating the need for

every KIC to contract or hire these services individually. Through the KIII finance department, the KICs conducted, among other things, their bank borrowing. KIII borrowed money and arranged financing on behalf of all of the KICs and effectively functioned as a corporate banker.

53. As foreseen by the management of KIII and the KICs, the turndown in the energy business occurred. The entire petroleum related sector of the world economy began to experience losses, and, although not in the catastrophic sense generally experienced by other less stable organizations, some of the KICs began to experience operating losses. These losses did not jeopardize the individual KICs, much less the long term profitable viability of the KICs as a group. This long term viability is demonstrated by the

fact that despite 24 months of a depression in the energy sector of the world economy, as late as year end 1983 the KICs had a combined net worth of in excess of $330,000,000.00.

54. In contrast to KIII and the KICs, as the energy industry began to go into recession in early 1982, the new, inexperienced and/or poorly managed energy businesses began to go bankrupt on a daily basis and these failures continued and increased dramatically throughout 1983. The imprudent loans that the Banks had made during the boom years began to result in losses running into the billions of dollars. Many large lenders, such as Continental Illinois, literally became insolvent as a result of their ill-advised and speculative lending.

The New Banking Philosophy

55. The loses that lenders suffered

on their ill-advised energy loans of the late 1970's and early 1980's, losses that ran into the billions of dollars, spawned a fundamental change in the basic philosophy of most lenders, including the Banks, that had loaned money to businesses active in the energy industry. Despite protestations to the contrary, a fraud exemplified by the conduct that gives rise to this action, the lending industry in general, including the Banks, began to abandon the concept of working with their energy customers to weather the downturn.

56. In retrospect, it is now clear that by mid-1983 the major energy lenders, and certainly the Defendant Banks, were faced with huge losses and were being pressured by government regulators. Confronted with these problems, they abandoned any intention of working in good faith with their energy related borrower

partners, a fundamental change in banking attitude. In fact, the new, but fraudulently unstated intention became to extract every possible dollar from energy related borrowers and then, having forced those borrowers into liquidation or bankruptcy, either acquire the borrowers or the borrowers' assets. To effectuate this intention, by mid to late 1983, most major lenders, and certainly the Banks, had determined to stop affording to businesses related to the energy business prudent loans that were structured in a manner calculated to assist the long term viability of the borrower. Furthermore, they had determined to cease entering into good faith restructuring agreements. In the case of strong borrowers, such as KIII and the KICs, the new strategy was to use misrepresentation and the hiding of true intent in order to gouge as much profit as

possible, obtain the upper hand in any negotiations through forcing or fraudulently inducing borrowers to accept terms of alleged restructuring that were impossible to meet, and then, after squeezing out the last penny of profit, force liquidation or bankruptcy in order to take the assets or the business itself. This strategy of misleading borrowers and coercing an ultimate liquidation or bankruptcy, hereafter to be referred to as the "the fraudulent banking philosophy", constituted an artifice or design to defraud that was calculated to result in "forced sales" of securities.

57. Furthermore, by not disclosing the fraudulent banking philosophy and the unilateral and fundamental change in bank-borrower relations it brought about, countless lenders, including the Banks, were defrauding an entire segment of the

United States, a segment comprised of the energy producing Southwestern States. This fraud was calculated to result in the transfer of companies and assets from their owners to the lenders; therefore, in countless instances, such as those that give rise to this action, the fraudulent banking philosophy touched upon the forced sale of securities.

THE FRAUD OF THE AGENT BANKS BEGINS

58. By early 1983, the management of the KICs recognized that a financial restructuring was prudent. At this time, management had numerous options for debt and working capital restructuring, but, quite logically, determined first to deal with their long time partners, the Banks. Wholly unaware of the fundamental changes that had secretly occurred as a result of the fraudulent banking philosophy, management of the KIII and KICs, began to

discuss the matter with several of the Banks. After discussions with the banks and in accordance with the recommendations of several banks, management began to contemplate a consolidated credit with KIII as named borrower and the KICs, including KHC as guarantors. KIII acted as the lead company in bank negotiations throughout all periods material to this Complaint.

59. After discussions with several of the Banks, and in particular Security and Morgan, management of KIII accepted the banks' suggestion that the best arrangement would be to restructure most unsecured debt into a $550,000,000.00 unsecured credit facility known as a "revolver", a type of facility where a borrower may reborrow during the term of the loan prior repayments of principal. This revolver would have a primary term of

36 months and would be at an interest rate of essentially prime. This type of facility would have resulted in immediately freeing up approximately $65,000,000.00 for working capital. Security and Morgan advised the KICs that this type of facility was workable and that they were capable of putting the restructuring together. Security and Morgan suggested that they act as Agent Banks to work on behalf of KIII and the KICs for the negotiation and implementation of such a facility. This arrangement was discussed on numerous occasions through the use of means of interstate commerce and the United States mails, including, but not limited to the following:

(a) During telephohe conference on June 3, 1983 between the Agent Banks and KIII;

(b) In a letter of October 19, 1983

posted through the United States Mails by Security to KIII; and

(c) During a telephone conference on November 3, 1983 between the Agent Banks and KIII.

At no time were the Agent Banks truthful with KIII. They knew but did not disclose that, consistent with the new fraudulent banking philosophy, the Banks had no intention of affording to KIII and the KICs a $550,000,000.00 revolving unsecured loan at a prime interest rate. Totally misled by this deception, on or about December 3, 1983, the KIII accepted the offers and appointed Security and Morgan, the Agent Banks, as its agents.

60. Throughout the period that discussions were being held regarding the agency arrangement, the Agent Banks were directly and indirectly participating in the affairs of KIII through a pattern of fraudulent misstatements and material

omissions. This pattern of fraud is exemplified by the following instances, to wit:

(a) On or about October 12, 1983 by a telex conveyed over interstate wire, Security represented to KIII, acting as principal for the KICs in the debt restructuring, that "the last thing" it desired was to "take control" of the Companies.

(b) On or about October 13, 1983 by a telex conveyed over interstate wire, Security represented it wanted a restructuring that KIII, acting for the Companies, could be "happy with."

(c) On or about October 19, 1983 by a letter sent through the United States Mails, Security on behalf of itself and Morgan represented it wanted an environment of "mutual support, confidence and trust."

(d) On or about October 21, 1983, in a telephone conversation using a means of interstate commerce, Morgan represented it would work for an unsecured loan facility.

Representations such as those above were believed and relied upon by management of KIII and the KICs. Therefore, these misstatements and omissions of the Agent

Banks, as well as many others that were to occur later, constituted direct and indirect participation by the Agent Banks in the affairs of KIII. This participation in the affairs of KIII by Security and Morgan, and later only by Morgan will be referred to this Complaint as the "Agents' fraud." In addition, these misrepresentations touched upon and were therefore made in connection with the forced sale of securities.

The Syndicate

61. As noted above, from the inception of discussions Security and Morgan fraudulently represented that in their opinion, banks then holding approximately $484,000,000.00 in the KICs existing debt would form a "syndicate" to fund the new revolving facility. The anticipated participants in the restructured debt were, in the main, those

of the Banks previously identified as the "Syndicate" in paragraphs 14 through 28 of this Complaint. When the alleged negotiations for the restructuring commenced in late 1983, the Agent Banks knew and concealed one fundamental fact. They knew and did not disclose that the Syndicate, acting in accordance with the new fraudulent banking philosophy, would not enter into a good faith restructuring of the debt of KIII and the KICs. They knew that the Syndicate's true intentions would be to extract as much cash and profit as possible from the KICs and then act to acquire KIII, KHC and the KIC's or to acquire substantially all of the assets of the companies. This intention constituted a scheme and artifice to defraud the shareholders of KHC. Specific instances in which the means and instrumentalities of interstate commerce

were used to further this scheme and artifice to defraud include but are not limited to the following:

(a) A telex sent through interstate wire on or about November 21, 1983 from Security to KIII over the signature of Donald J. Robinson ("Robinson"), a vice president of Security;

(b) A telex sent through interstate wire on or about November 21, 1983 from Morgan to Security over the signature of Payne;

(c) A telephone conversation conducted through a means of interstate commerce on or about November 21, 1983 between Robinson and Walter Strittmatter ("Strittmatter") an officer and director of the Companies;

(d) A letter sent through the instrumentalities of interstate commerce on or about November 23, 1983 by Security over the signature of Robinson.

It was the intention of the Agent Banks and the Syndicate to induce in KIII, and through KIII, management of the KICs, a belief that good faith restructuring was possible, manuever KIII and the KICs from

a position of strength to one of weakness, exert coercive leverage to obtain as much cash as possible in the short term and then share in the liquidation of the KICs or acquire them by becoming the owners of KIII and KHC. This malicious strategy and its pursuit by the Syndicate, as will be hereafter described in detail, will be referred to in this Complaint as the " the Syndicate's Scheme to Defraud." Again, this fraudulent conduct touched upon the forced sale of securities and, therefore, was accomplished in connection with the sale of securities.

62. The Agent Banks began immediately to contact all creditor banks of the KICs and brought together those Defendant Banks identified above that became the Syndicate. By mid-January of 1984 the members of the Syndicate were in at least tacit agreement to pursue the

Syndicate's scheme to defraud and were acting in concert. It is significant that they chose, in the main, to speak through the Agent Banks. It is now clear that the Agent Banks were in a conflict of interest. As purported agents of KIII and the KICs, they owed a fiduciary duty of full disclosure and the utmost fair dealing. The Agent Banks were also representing, and Plaintiffs were ultimately to learn, advising the Syndicate. As was learned much later, the Agent Banks never honored their fiduciary duty to KIII and the KICs, but were at all times acting for the interest of the Syndicate and for the effectuation of the Syndicate's scheme to defraud.

Implementation of the Syndicate's Scheme to Defraud

63. The Syndicate began almost immediately to implement the scheme to

defraud. As early as January 1984, the Syndicate, acting in concert, commenced using what was to prove its most common and successful stratagem. This stratagem was to feign agreement as to basic terms, and obtain concessions from KIII in the process, only to renege on the agreement and use the concessions for leverage to coerce still further more onerous terms. This was usually done by demanding new terms or loan covenants that had the practical effect of modifying the substance of the prior agreements. This tactic was nothing more than a sophisticated "bait and switch." Over a period stretching from January 1984 through January 1985, the Syndicate would time and again purport to reach an agreement, the KICs would act in reliance on the agreement and make concessions, only to find the agreement vanished and in

its place was a new set of demands from the Syndicate.

64. A corollary to the basic stratagem was a constant dragging out of the negotiations. The Syndicate knew that as time passed and various loans held by Syndicate members began to mature, leverage over KIII and the KICs increased. At the outset of restructuring discussions, the KICs had believed that Morgan and Security, their agents, would present a new syndicated loan by the end of 1983 or early January of 1984 at the latest, this did not occur. Instead of a loan agreement, as noted above, the first presentment by Morgan and Security, made December of 1983 and January of 1984, was to make new demands. These demands included a change in the proposed credit from unsecured to collateralized and a demand to decrease the principal of the

revolver. Further, new and more onerous asset to liability covenants were demanded. Repeatedly during this critical period, Security and Morgan, pursuing both the Agents' fraud and the Syndicate's scheme to defraud, continued to make false representations. Typical of these misrepresentations was one that occurred on or about January 23, 1984, during telephone conversation over an instrumentality of interstate commerce. Robinson on behalf of Security and Payne on behalf of Morgan represented that it was their belief that if the KICs would quickly agree to a "collateral call" provision, demands for collateral "up front" in the loan would be dropped. This representation was false, and the Agent Banks knew it to be false.

65. In February of 1984, the Syndicate's bad faith stalling began to

pay substantial dividends. Continental Illinois, as the lead lender on $120,000,000.00 worth of debt held by certain of the Syndicate members, was threatening suit. Other of the banks made threats as well. These threats were false, and the Syndicate knew them to be false, yet Morgan and Security used the threats to coerce KIII and the KICs to make several substantive concessions. First, it was agreed that the principal of the restructured loan would be reduced to $494,000,000.00, costing the KICs working capital. The collateral call provisions and more onerous asset to liability covenants were also accepted. The false threat of Continental Illinois filing suit was made on numerous occasions, including but not limited to, during a telephone call using an instrumentality of interstate commerce when Security Pacific

stated that the $120,000,000.00 would not be renewed without the KICs agreement to the new terms. KIII and the KICs, in exchange for the concessions, received an extension of thirty days, an amount of time they had been led to believe by the Agent Banks would be adequate to complete the restructuring agreement. In connection with the negotiations in January and February, KIII became dissatisfied with Security and terminated the agent agreement with that bank. Security remained, however, active in the negotiations and in regular communication with KIII. The use of the fraudulent threat in the case of the Continental Illinois matter was another typical tactic. The Syndicate would use a similar ploy throughout the remainder of 1984 by routinely claiming that members of the Syndicate were contemplating the

institution of involuntary bankruptcy against KIII, KHC and the KICs, when in fact there was no intention to do so at that time. As was the case with prior and subsequent conduct, this fraud touched upon the forced sale of securities and occurred, therefore, in connection with the sale of securities.

The Steering Committee

66. On or about March 15, 1984, apparently in connection with the false threats regarding the Continental Illinois credit, the Syndicate created what it called the "Steering Committee." The Steering Committee was originally composed of Continental Illinois, First Interstate, Bank of New York, Irving, Mercantile, Morgan, Continental and Security. The precise composition of this committee has changed from time to time over the years; however, Morgan, Mercantile, Security,

Bank of New York, Irving and First Interstate have at all times been members. The Steering Committee came into existence on or about March 15, 1984. From that date through the end of 1984, it spoke primarily through Morgan. The Steering Committee was, and is today, an association in fact with ongoing identity and purposes. Its original purpose was to represent the Syndicate in connection with its dealings with the KICs. In 1985, its scope was broadened as it became the "de facto" unsecured creditor's committee during the KICs bankruptcy proceedings (to be described in detail infra) and today acts as the de facto board of directors of the Companies. The Steering Committee was and is an "enterprise" as that term is defined in RICO and each member of the Syndicate was and is associated with the enterprise.

The "Credit Override" Episode

67. One of the first acts of the Steering Committee was to suggest an "interim agreement." The stated purpose, according to the Steering Committee was to put all members of the Syndicate on an equal footing for a short period of time while a final restructuring was completed. This alleged "purpose" was stated or implied to the KICs on numerous occasions including, but not limited to, the following:

(a) During a telephone conversation using an instrumentality of interstate commerce on March 21, 1984 between a KIII officer, acting for the KICs, and Security, as spokesman for the Steering Committee;

(b) At a meeting in Fort Worth, Texas on March 27, 1984 between a KIII officer, acting for the KICs, and the Steering Committee and the Agent Banks, speaking primarily through Morgan and Payne;

(c) At a meeting in Fort Worth, Texas on March 29, 1984 between officers of the KICs and the Steering

Committee, speaking primarily through Payne, Morgan's vice president; and

(d) During a telephone conversation using an instrumentality ofinterstate commerce on March 30, 1984 between Morgan, speaking through Payne, as spokesmen for the Steering Committee and the Agent Banks and an officer of KIII.

In addition to the overt and calculated misrepresentations, there was a fundamental material fact that the Syndicate failed to disclose in connection with the negotiations for the Credit Override Agreement. That fact was that the Syndicate and the Agent Banks, in order to further their schemes to defraud, intended to demand, among other undisclosed but intended future demands, that Chase join in the proposed restructured revolving facility. This omission was fundamentally material because the Syndicate knew there was all but no chance that Chase would agree. At

that time Chase had a direct and complex credit arrangement with one of the KICs. This facility included interest incentives. It was a stable and profitable loan. Any reasonable banker would have made the loan. Likewise, any reasonable banker would know that Chase would have no incentive to surrender the benefits of that arrangement and enter the Syndicate.

68. The false representations and material omissions were intended by the Syndicate to induce the KICs to enter into an "interim agreement" and further the Syndicate's scheme to defraud. First, by increasing the interest being received by most members the short term goal of realizing quick profits was furthered. Second, and in the long run more importantly, it had the practical effect of burdening KIII and the KICs with

additional interest payments, while, at the same time, putting all outstanding loan obligations to the Syndicate on a demand basis. It all but assured the Syndicate and Morgan, now the sole agent, would have the ability to coerce KIII, KHC and the KICs into doing precisely what the Syndicate and Morgan wanted done.

69. Management of the KICs, acting in good faith, believed the false representations, and, unaware of the intended new demands that were to follow the interim agreement, consented to the proposal. The contract between the KICs and the Syndicate was called the "Credit Override Agreement." It was executed in May of 1984 and effective as of April 1, 1984. In connection with the execution of the Credit Override Agreement, the Syndicate formalized its existence by the execution of an Intercreditor Agreement.

The Credit Override Agreement fundamentally altered the relationship between the Syndicate on the one hand and KIII, KHC nd the KICs on the other. First, it increased the Companies' monthly debt service by $800,000.00 per month. Second, it made all of the KICs guarantors one of the other, effectively destroying any possibility of individual rehabilitation of the KICs. And, finally, it put all of the obligations on a demand basis. As noted the KICs believed the Credit Override Agreement to be an intermediate term, temporary measure which would be in place for no more than sixty days while a final agreement was consummated. Had the Syndicate through the Steering Committee told the truth, the officers and directors of KIII, KHC and the KICs would have never seriously considered, much less entered into, the

Credit Override Agreement.

70. In addition to the Credit Override Agreement, on April 1, 1984, the KICs, acting through Kenneth W. Davis, Jr., entered into a second formal agent's agreement with Morgan. The agreement was signed by Payne on behalf of Morgan and provided that KIII would pay to Morgan an agent's fee of $500,000.00 and $100,000.00 for three (3) years in consideration for efforts by Payne and Morgan to reach a final restructuring of the KICs debt. In connection with the Credit Override Agreement and the Intercreditor Agreement, Morgan and the Syndicate also agreed that Morgan would be chairman of the Steering Committee and as chief spokesman during the continuing negotiations to restructure the debts owing to the Syndicate.

The Tax Refund Episode

71. Once the Credit Override

Agreement was in place, the Steering Committee began its fraudulent activities aimed toward obtaining a huge cash payment of principal from a large federal income tax refund it knew the KICs were scheduled to receive in the Summer of 1984. This was, in essence, an almost immediate disavowal of one of the primary representations upon which the officers and directors of KIII, KHC and KICs relied upon in agreeing to the Credit Override Agreement, that is that the credit facility to be agreed upon would have an real principal of $490,000,000.00. Demanding an immediate $50,000,000.00 paydown effectively reduced the proposed credit to $440,000,000.00.

72. In connection with this fraudulent episode, the steering committee and Morgan as Agent repeatedly represented that a fair and reasonable restructuring

would be quickly accomplished if the KICs agreed to the $50,000,000.00 paydown. These instances included, but were not limited to the following:

(a) On June 14, 1984, the Steering Committee and the Agent, sent a letter over Payne's signature through the United States Mail that misrepresented that if the pay down was made the Syndicate would make available a facility substantially on the terms set forth in an attachment to the letter.

(b) On July 3, 1984, the Steering Committee and the Agent, acting through Morgan, represented in a telephone conference using an instrumentality of interstate commerce that the Syndicate would enter into a good faith restructuring agreement if the $50,000,000.00 paydown was made.

(c) On September 6, 1984, the Steering Committee, and the Agent sent a letter over Payne's signature to KIII representing that the Steering Committee would in good faith recommend a debt restructuring on the terms attached (which included the KICs promise to the $50,000,000.00) when the Committee had no intention of so recommending, and when, the Committee knew that the terms as set out would not be accepted by the Syndicate.

(d) On or about September 10, 1984, the Steering Committee and the Agent in a telephone conversation using an instrumentality on interstate commerce again represented that the Steering Committee would in good faith recommend a debt restructuring on the terms set out in the attachment to Payne's September 6, 1984 letter (which included the KICs promise to the $50,000,000.00 pay down) when Steering Committee had no intention of so recommending and when the Committee and the Agent knew the terms as set out would not be accepted by the Syndicate.

(e) On September 12, 1984, the Steering Committee and the Agent, in a telephone conversation using an instrumentality of interstate commerce made substantially the same misrepresentation set out in (d) above.

(f) On September 14, 1984, the Steering Committee and the Agent, in a telephone conversation using an instrumentality of interstate commerce, with the intention, among others, of inducing the $50,000,000.00 payment misrepresented that the Syndicate desired Ken Davis to continue as chief executive of the KICs for at least five more years.

(g) On September 14, 1984, the Steering Committee and the Agent sent a letter over the signature of Payne representing the Steering Committee would recommend a good faith

restructuring if the KICs would agree to the terms attached to the letter (including the $50,000,000.00 paydown) when the Committee had no intention of so recommending and when the Committee knew the terms as set out would not be accepted by the Syndicate.

73. In addition to the misrepresentations that were inherent in the communications described in paragraph 72. (a) through (g) above, the representations were further fraudulent because there was no disclosure of the Syndicate's scheme to defraud nor of the Agents' scheme to defraud nor was there disclosure that as soon as the $50,000,000.00 payment was made, the Syndicate would increase its demands and, as well, refuse to restructure without the entry of Chase into the Syndicate. As with other misrepresentations and material omissions stated in other sections of this Complaint, the misrepresentations

described in paragraph 72 touched upon the forced sale of securities and were therefore made in connection with the sale of securities.

74. Acting in reliance upon the representations and ignorant of the material omissions, the officers and directors of the KICs agreed to make the pay down and did so.

75. Once the $50,000,000.00 pay down was made, the Syndicate immediately reneged on the representations of the Steering Committee and increased it demands. First, the demand that Chase agree to come into the Syndicate surfaced all but immediately after the pay down. In addition, the Syndicate made other new demands including (i) audits at the expense of the Companies, (ii) more onerous interest terms, more onerous asset to liability ratios and (iv) covenants

impairing the ability of the KICs to obtain cash when needed. In retrospect it is clear that there was not even a pretext of good faith negotiation of a restructuring agreement after the paydown.

Fraud on the Corporate Plaintiffs

76. The Corporate Plaintiffs are, and always have been, separate and distinct from the KICS. They are essentially owned by Kenneth W. Davis, Jr. and his immediate family.

77. Beginning as least as early as the second quarter of 1984, members of the Syndicate entered into a conspiracy calculated to harm the Corporate Plaintiffs in the hope of coercing the KICs. Examples of this bad faith are as follows:

(a) In May of 1984 TAB put unnecessary bureaucratic restrictions on KFC's purchase of receivables of the KICs.

(b) In May of 1984 TAB demanded additional security on KFC's line of credit and pulled a letter of credit issued for the benefit of a corporate plaintiff.

(c) The Syndicate agreed that no funds would be loaned the corporate plaintiffs, no matter how good the proposal.

(d) Interfirst Fort Worth demanded personal guaranties from officers of the Corporate Plaintiffs.

78. These demands and restrictions, were a part of the banks deliberate attempts to orchestrate a financial crisis calculated to harm the Corporate Plaintiffs while at the same time furthering the Syndicate's scheme to defraud.

The Conspiracy Expands

79. By mid-February 1985, the Syndicate determined that it had extorted as much cash as possible, approximately $55,000,000.00 from the tax refund episode and the Credit Override Agreement Episode,

and determined to begin their direct efforts to acquire the KICs or their assets. On February 20, 1985, the Steering Committee, joined by Nova Scotia, filed involuntary bankruptcy petitions against the KICs. The Intercreditor Agreement of April 1, 1984 provided that it terminated on the commencement of bankruptcy proceedings. By tacit agreement of the Syndicate members it was kept in effect. In addition, the Conspirator Defendants agreed to abide by the substance of the intercreditor agreement and took no actions inconsistent with it.

80. The Steering Committee controlled the Creditor's Committees of the bankruptcy proceedings, and, for approximately a year a pretext was made of continuing negotiations for restructuring the unsecured debt. Nothing was resolved,

nor did the Syndicate ever have an intention of doing so. The true intention was to obtain ownership of the Companies.

81. At a precise time unknown, but at least at a time prior to April 1, 1986, the Conspiracy Defendants went further than mere compliance with the substance of the Intercreditor Agreement and agreed to join with the Syndicate and to assist in freezing the Davis family out of the Companies. In essence, they agreed to participate in the fraudulent forced sale of the stock of the Companies.

82. The agreement reached by and between all Defendants constituted an illegal conspiracy. The Defendants committed many overt illegal acts in furtherance of the agreement including agreeing to and forbearing in the prosecution of individual claims in exchange for participating pro rata in the

equity of KHC, KIII and the KICs.

83. Once this illegal agreement was in place, the Steering Committee, acting as the Creditor's Committee, proposed a plan of reorganization that called for the Davis Family to be stripped of all of its stock and complete ownership of the KICs to be vested in the Defendants. This occurred in November, 1986, and that event was a sale of securities under the Securities Laws of the United States, and, as pointed out time again in this Complaint, there were repeated instances of fraud in connection with that sale.

Direct Damages Sustained By

The Davis Family

84. As of July 1, 1983, the Davis Family stock, together with that owned by T. Cullen Davis, in the KICs had a value of at least $400,000,000.00. They received no consideration whatsoever from

the forced sale.

Direct Damages Sustained by the Corporate Plaintiffs

85. The fraudulent acts perpetrated on the Corporate Plaintiffs resulted in injury to their business and property in amounts in excess of $20,000,000.00.

COUNT ONE
RICO Conspiracy - Syndicate Defendants

86. For purposes of this Count, Plaintiffs incorporate paragraphs 1 through 85 of this Complaint. In summary, Plaintiffs bring this count against the Syndicate defendants, for damages resulting from their conduct including the conspiracy designed to obtain effective control of the KICs accomplished through numerous omissions of material fact and fraudulent statements relating to the ability and willingness to arrange and obtain financing. This conspiracy

involved the Syndicate's conducting the affairs of the Steering Committee as its representative organization, manipulation of the unsecured creditor's committee in the involuntary bankruptcy and currently as the de facto Board of Directors of the KICs.

87. This Count is brought pursuant to the provisions of 18 U.S.C. § 1961 et seq., known under the acronym RICO (Racketeer Influenced and Corrupt Organizations Act), hereinafter referred to as "the Act." The conduct of the Syndicate Defendants violated the provisions of 18 U.S.C. § 1962(d) which prohibits any person conspiring to violate any of the provisions of 18 U.S.C. § 1962 (a), (b) or (c).

88. The Syndicate members conspired to violate 18 U.S.C. § 1962(c) by conspiring to operate and/or participate

in the conduct, directly or indirectly, of the affairs of an Enterprise, the Steering Committee, that was engaged in interstate commerce, through a pattern of racketeering activity.

89. The Steering Committee was and is an enterprise as defined by the Act, as the members of the committee constitute an association in fact.

90. The pattern of racketeering activity through which the Syndicate conspired to operate the Steering Committee included, but were not limited to:

(a) Repeated violations of Rule 10(B)(5) promulgated by the United States Securities Exchange Commission. (See, for example, the factual recitations in paragraphs 61, 65,72 and 73, supra.)

(b) Countless violations of 18 U.S.C. § 1341 (mail fraud). (See, for example, the factual recitations in paragraphs 61 through 75, supra.)

(c) Countless violations of 18

U.S.C. § 1343 (wire fraud). (See, for example, the factual recitations in paragraphs 61 through 75, supra.)

91. Plaintiffs were injured in their business and property as a result of the conspiracy to operate the Steering Committee through a pattern of racketeering activity. The members of the Davis Family were injured in the amount of at least $300,000,000.00 and the Corporate Plaintiffs were injured in the amount of at least $20,000,000.00. All of the Plaintiffs are entitled to recover from the Defendants that were members of the Syndicate their damages threefold, as well as their attorney fees.

COUNT TWO
RICO Violations -
Morgan, Security and Nova Scotia

92. For purposes of this Count Plaintiffs incorporate paragraphs 1 through 85 of this Complaint. Plaintiffs

bring this count against the Agent Banks for damages suffered as a result of the conduct of the Agent Banks which, in summary, was the omissions and material misrepresentations made by the Agent Banks to the KICs that there was an ability and a willingness to obtain the financing, when, in fact, the scheme was to obtain substantial cash from the KICs and ultimately the assets of the KICs.

93. Morgan and Security violated 18 U.S.C. § 1962(c) of the Act by directly operating an Enterprise engaged in interstate commerce, the Steering Committee, through a pattern of racketeering activity. The Steering Committee was and is an enterprise as defined by the Act, as the members of the committee constitute an association in fact.

94. The pattern of racketeering

through which Security and Morgan operated the Steering Committee, included, but was not limited to commission of the following acts:

(a) Repeated violations of Rule 10(b)(5) promulgated by the United States Securities Exchange Commission. (See, for example, paragraphs 56 through 75, supra).

(b) Countless violations of 18 U.S.C. § 1341 (mail fraud). (See, for example, paragraphs 60, 67 and 72, supra.)

(c) Countless violations of 18 U.S.C. § 1343 (wire fraud). (See, for example, paragraphs 60, 67 and 72, supra.)

95. Nova Scotia violated 18 U.S.C. § 1962(c) by indirectly participating in the conduct of the affairs an Enterprise, the Steering Committee, engaged in interstate commerce, through a pattern of racketeering activity. Nova Scotia was appraised of the illegal operations conducted by Security and Morgan. As the largest single creditor of the KICs that

was a member of the Syndicate, it had the power to determine the manner in which the affairs of the Steering Committee were conducted. It exercised that power by knowingly allowing Morgan and Security to pursue their unlawful course; therefore, it indirectly conducted the affairs of the Enterprise through a pattern of racketeering activity.

96. Plaintiffs were injured in their business and property as a result of the operation of the Steering Committee through a pattern of racketeering activity. The members of the Davis Family were injured in the amount of at least $300,000,000.00 and the Corporate Plaintiffs were injured in the amount of at least $20,000,000.00. All of the Plaintiffs are entitled to recover their damages threefold, as well as their attorney fees.

COUNT THREE
RICO Conspiracy - Morgan and Security

97. For purposes of this Count Plaintiffs incorporate paragraphs 1 through 85 of this Complaint. Plaintiffs assert this count for damages suffered as a result of the conspiratorial conduct of the Agent Banks, which, in summary involved acts calculated to participate indirectly in the affairs of the KICs by making material omissions and misrepresentations of facts as to the ability and willingness to obtain the financing, when, in fact, the design was to obtain control of the business and assets of KICs. For the purposes of this count, KHC and KIII must legally be considered as one and the same.

98. Morgan and Security, the Agent Banks, were associated with KIII. In violation of 18 U.S.C. §1962(d) of the

Act, they conspired to participate indirectly in the conduct of KIII's, an enterprise as defined by the Act, affairs through a pattern of racketeering activity. Although not discovered until recently, it is believed that the conspiracy came into being in or about October of 1983 and continued through at least May of 1984.

99. The pattern of racketeering through which the Agent Banks conspired to conduct the affairs of KIII was intended to include but not necessarily limited to the following acts:

(a) Countless violations of 18 U.S.C. § 1341 (mail fraud). (See, for example, paragraphs 59 and 60, supra.)

(b) Countless violations of 18 U.S.C. § 1343 (wire fraud). (See, for example paragraphs 59 and 60, supra.)

(c) Violation of the Texas Fiduciary Fraud Statute (Tex. Penal Code art. 32.43). (See, for example paragraphs

59 through 62, supra.)

100. Plaintiffs were injured in their business and property as a result of the conspiracy to conduct the affairs of KIII through a pattern of racketeering activity. The members of the Davis Family were injured in the amount of at least $300,000,000.00 and the Corporate Plaintiffs were injured in the amount of at least $20,000,000.00. All of the Plaintiffs are entitled to recover from Morgan and Security their damages threefold, as well as their attorney fees.

COUNT FOUR
RICO - Morgan and Security

101. For purposes of this Count Plaintiffs incorporate paragraphs 1 through 85 of this Complaint. This count is brought for the recovery of damages suffered by Plaintiffs as a result of the acts of the Agent Banks' conduct, which in

summary, was the material misrepresentations and omissions of fact, in connection with the Agent Banks "representation" of the KICs in obtaining financing. The Agent Banks used KIII and their association with KIII to orchestrate the fraudulent scheme of obtaining the business and assets while pretending to arrange the financing. For purposes of this count KHC and KIII must legally be considered as one and the same.

102. Morgan and Security indirectly participated in the affairs of KIII, an enterprise engaged in interstate commerce, through a pattern of racketeering activity.

103. The pattern of racketeering through which Morgan and Security indirectly participated in the affairs of KIII included, but was not limited to, the following acts:

(a) Countless violations of 18 U.S.C. § 1341 (mail fraud). (See, for example, paragraphs 59 and 60, supra.)

(b) Countless violations of 18 U.S.C § 1343 (wire fraud). (See, for example, paragraphs 59 and 60, supra.)

(c) Violations of the Texas Fiduciary Fraud Statute (Tex. Penal Code art. 32.43). (See, for example paragraphs 59 through 62, supra.)

104. Plaintiffs were injured in their business and their property as a result of the Agent Banks indirect conduct of the affairs of KIII through a pattern of racketeering activity. The members of the Davis Family were injured in the amount of at least $300,000,000.00 and the Corporate Plaintiffs were injured in the amount of at least $20,000,000.00. All of the Plaintiffs are entitled to recover their damages threefold, as well as their attorney fees.

COUNT FIVE
Securities Fraud

105. For purposes of this Count the Davis Family incorporate paragraphs 1 through 85 of this Complaint.

106. In connection with the purchase and sale of securities Security and Morgan violated Rule 10(b)(5) promulgated by the United States Securities Exchange Commission. Many of these statements are set forth at length in this Complaint, including, but not limited to paragraphs 58 through 65.

107. Each member of the Syndicate was a "controlling person" as that term is understood in connection with the Securities Laws of the United States; therefore, each is jointly and severally liable with Morgan and Security for damages the Davis Family has suffered as a result of the fraud.

108. As a direct and proximate result of those violations, the Davis

Family was injured in the amount of at least $300,000,000.00.

COUNT SIX
Aiding and Abetting Securities Fraud

109. For purposes of this Count the Davis Family incorporate paragraphs 1 through 85 of this Complaint.

110. Each Defendant in this action knowingly and intentionally aided and abetted the violations of Securities Exchange Commission Rule 10(b)(5) described in Count FIVE above. Each Defendant is, therefore, jointly and severally liable to the Davis Family for the damages, at least $300,000,000.00, they sustained as result of the fraud of Morgan and Security.

COUNT SEVEN
Fraudulent Manipulation of Stock Value

111. For purposes of this Count the Davis Family incorporate paragraphs 1 through 85 of this Complaint.

112. In connection with their desire to acquire the Companies, the Syndicate engaged in repeated fraudulent activities that have been described in detail in many sections of this Complaint. (See, for example, paragraphs 61 through 75, supra.) This fraud directly and proximately resulted in the loss of value of the stock in the KICs held by the Davis Family in the amount of at least $300,000,000.00 for which the members of the Syndicate are jointly and severally liable to the Davis Family.

113. Further, the conduct of the members of the Syndicate was of such an egregious and malicious nature, that an award of exemplary damages are mandated, and should be awarded, jointly and severally against each member of the Syndicate, in the amount of at least $1,200,000,000.00.

COUNT EIGHT
Fiduciary Fraud

114. For purposes of this Count the Davis Family incorporate paragraphs 1 through 85 of this Complaint.

115. The members of the Steering Committee unlawfully and in bad faith set out to control, direct and manipulate the affairs of the KICs. By the repeated misrepresentations and coercions of the Steering Committee, the independent judgment of the directors of the KICs was thwarted. As a result of its fraudulent conduct the Steering Committee became the constructive directors of the KICs. By manipulating the affairs of the KICs for their own purposes, the Steering Committee breached its fiduciary duty to the shareholders of the Companies, the Davis Family.

116. As a result of the breach of

duty, the Davis Family was damaged in the amount of at least $300,000,000.00, for which the members of the Steering Committee are jointly and severally liable.

117. Further, the conduct of the Steering Committee, was of such an egregious and malicious nature, that an award of exemplary damages is mandated. Exemplary damages in the amount of at least $1,200,000,000.00 should be awarded.

COUNT NINE
Civil Conspiracy - The Davis Family

118. For purposes of this Count the Davis Family incorporates paragraphs 1 through 85 and Counts ONE, THREE, SIX and SEVEN of this Complaint.

119. The stock fraud and manipulation described above was effectuated by overt acts in furtherance of the conspiracy in which every Defendant

participated. The Syndicate Defendants became conspirators on or about January 1, 1984 when they agreed to participate in the Syndicate's scheme to defraud. The Conspirator Defendants joined the conspiracy in or about March of 1985 and, upon information and belief, it is alleged they joined with knowledge of the Syndicate's scheme to defraud. Therefore, each Defendant is jointly and severally liable for all the damage sustained by the Davis Family as set out in Counts FIVE, SIX and SEVEN of this Complaint.

120. The knowing and intentional entry into the conspiracy mandates the award of exemplary damages, jointly and severally against each Defendant, in the amount of at least $1,200,000,000.00.

COUNT TEN
Civil Conspiracy -
The Corporate Plaintiffs

121. For purposes of this Count the

Corporate Plaintiffs incorporate paragraphs 1 through 85 of this Complaint.

122. The Syndicate conspired to injure the Corporate Plaintiffs as a part of their effectuation of their scheme to defraud. The conduct constituting and describing the fraud and scheme is set forth specifically in paragraphs 76 through 78, supra.

123. The Corporate Plaintiffs have been proximately injured as a result of this conspiracy in an amount of at least $20,000,000.00.

124. Further, the conduct of the Syndicate of such an egregious and malicious nature that an award of exemplary damages is mandated. Exemplary damages in the amount of at least $60,000,000.00 should be awarded.

COUNT ELEVEN
Breach of Duty and Good Faith and Fair Dealing

125. For purposes of this Count the Corporate Plaintiffs incorporate paragraphs 1 through 85 of this Complaint.

126. TAB and Interfirst Fort Worth were lenders to the Corporate Plaintiffs and all times owed a duty of good faith and fair dealing in their relationship with the Corporate Plaintiffs. On numerous occasions, these banks did not act honestly in fact, instead they failed to act in good faith toward the Corporate Plaintiffs, in part, out of their desire coerce and defraud KHC, KIII, and the KICs. Several instances demonstrating bad faith are set forth in paragraph 77 of this Complaint.

127. The Corporate Plaintiffs are entitled to damages proximately caused by TAB and Interfirst Fort Worth, members of the Syndicate, to deal fairly and in good

faith. These damages, totalling at least $20,000,000.00, should be awarded jointly and severally against TAB and Interfirst Fort Worth.

128. Further, the conduct of TAB and Interfirst Fort Worth was of such an egregious and malicious nature, that an award of exemplary damages is mandated. Exemplary damages in the amount of at least $60,000,000.00 should be awarded.

COUNT TWELVE
Tortious Interference with
Business Relationship

129. For purposes of this Count, the Corporate Plaintiffs incorporate paragraphs 1 through 85 and Counts ONE through EIGHT herein.

130. The relationship of interlocking ownership between the KICs and the Corporate Plaintiffs was an advantageous business relation for the Corporate Plaintiffs. This relation was

calculated to be worth to the Corporate Plaintiffs at least $50,000,000.00 over the ten year period between 1984 and 1994.

131. The action of the Defendants, including the Individual Defendants, in effectuating the scheme and divesting the Davis Family of its ownership of the KICs tortiously interfered with that relationship and has damaged the Corporate Plaintiffs in the amount of at least $50,000,000.00.

132. Further, the interference was intentional and malicious mandating the award of exemplary damages, jointly and severally, the amount of at least $150,000,000.00.

COUNT THIRTEEN
Fraud and Malfeance by the Individual Defendants

133. For purposes of this Count, Plaintiffs incorporate by reference paragraphs 1 through 85 of this Complaint,

as well as COUNTS FIVE, SIX, SEVEN AND EIGHT.

134. The Individual Defendants knowingly and intentionally participated in the frauds described in the portions of this Complaint that are referenced. Therefore, they are jointly and severally liable for the damages suffered by Plaintiffs as set forth in COUNTS FIVE, SIX, SEVEN AND EIGHT, including, where appropriate, exemplary damages.

WHEREFORE, PREMISES CONSIDERED Plaintiffs have judgment against the Defendants in the amounts set forth in each Count of this complaint, attorney fees, pre and post judgment interest, costs of Court and such other and further relief at law and in equity to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

BURLESON, PATE & GIBSON
2414 N. Akard, Suite 700
Dallas, Texas 75201
(214) 871-4900

By:_____
Phil Burleson, Sr.
Dennis Weitzel
Harold Vanberg

KLINE & KLINE
Richard Coulson
Stephen W. Elliott
Timothy Kline
Kline Law Building
720 N.E. 63rd Street
Oklahoma City, OK 73105
(405) 848-4488

W. Allyn Hoaglund
Attorney at Law
3030 Two Houston Center
Houston, Texas 77010

WILSHIRE, SCOTT, HALBACH & DYER
Eugene B. Wilshire, Jr.
4350 First City Tower
Houston, Texas 77002
(713) 651-1221

OF COUNSEL:

Daniel W. Shuman
Attorney at Law
3315 Daniels
Dallas, Texas 75275
(214) 692-2577

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Plaintiffs' Amended Complaint has been served on American Bank & Trust Company of New Orleans, The Trust Company of New Orleans, The Bank of New York, Bank of Oklahoma, N. A., Credit Commercial De France, First Interstate Bank of California, First RepublicBank of California, First RepublicBank 'Fort Worth, Irving Trust Company, MBank Dallas, MBank Fort Worth, MBank Houston, Morgan Guaranty Trust Company of New York, Seattle-First National Bank, and Security Pacific National Bank, Bank of Nova Scotia, The Chase Manhattan Bank, N.A., First City National Bank of Fort Worth, First City National Bank of Houston, Sanwa Bank California (Successor to Lloyds Bank of California) by and through their respective attorneys-in-charge, in a manner prescribed by the Federal Rules of Civil Procedure on this the ____ day of July, 1988.

_____

Phil Burleson, Sr.